NO. 83-5530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS N. SCHIRO,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I. Are the review procedures established by the Indiana death penalty statute, I.C. 35-50-2-9 and adopted by the Indiana Supreme Court adequate to insure that the death penalty will not be imposed in Indiana in an arbitrary and capricious fashion, thus violating the Eighth Amendment's prohibition against cruel and unusual punishment?

II. While petitioner's case was pending on appeal, the Indiana Supreme Court ordered that the trial court amend its written findings at the sentencing so as to include on or more of the statutory aggravating circumstances. Did such a procedure deny the petitioner the due process of law and twice place him in jeopardy in violation of the applicable Constitutional provisions?

III. Was the petitioner twice placed in jeopardy by the trial judge's decision to impose the death penalty notwithstanding the jury's prior sentencing verdict that the death penalty not be imposed?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those shown in the caption of the case.

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TABLE OF AUTHORITIES

REFERENCE TO THE OPINION BELOW

The opinion of the Indiana Supreme Court, reported at 451 N.E.2d 1047, appears as Appendix A hereto.

STATEMENT OF THE GOUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Indiana Supreme Court was entered on August 5, 1983. (In that court, no separate judgment is entered, it being contained in the opinion.)

The Supreme Court of Indiana is the highest court in that State having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11(B))

This petition for writ of certiorari will be filed within sixty (60) days of the judgment of the Indiana Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States:

5th Amendment:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * "

6th Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

14th Amendment, §1:

> "* * * nor shall any state deprive any person of life, liberty or property, without due process of law * * *"

Indiana Code, I.C. 35-50-2-9:

> (Due to its length, it is set out in Appendix B)

Rule 2, Indiana Rules for the Appellate Review of Sentences:

"(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

STATEMENT OF THE CASE

The action was instituted by the filing of a three (3) count information against the petitioner on February 10, 1981 charging him with Count I - Murder, Count II - Murder while committing and attempting to commit rape, and Count III - Murder while committing and attempting to commit criminal deviate conduct. On April 9, 1981, the respondent filed Counts IIA and IIIA, alleging that the murder as set forth in Counts II and III was intentionally committed, and requesting, in each count, that the death penalty be imposed.

On April 6, 1981, the petitioner filed a motion to dismiss the information, alleging, inter alia, that the Indiana death penalty statute, I.C. 35-50-2-9, was in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in that it fails to provide "adequate review procedures so as to insure that the death sentence is not motivated by passion or prejudice, or is arbitrarily inflicted". The petitioner's motion to dismiss was denied on May 19, 1981.

Trial to a jury commenced on September 2, 1981. On September 12, 1981, the jury found the petitioner guilty of Murder while committing and attempting to commit rape as charged in Count II of the information. The facts of the case are summarized in the decision of the Indiana Supreme Court set forth at Appendix A.

Pursuant to I.C. 35-20-2-9, Appendix B, infra, the jury reconvened on September 15, 1981 for the sentencing hearing. At the hearing, both parties moved to incorporate by reference the evidence adduced at trial. After deliberations of approximately one hour, the jury returned with its verdict that the death penalty not be imposed.

Sentencing before the trial court was held on October 2, 1981. The court, rejecting the jury's sentencing verdict, imposed the death sentence. As part of the sentencing, the court read and filed its written findings and judgment which are set forth in Appendix C.

Petitioner filed a Motion to Correct Errors (the Indiana prerequisite to an appeal) on November 30, 1981. In it, he again raised the questions presented in his Motion to Dismiss. In addition, the petitioner alleged the following errors:

> "The Court's imposition of the death penalty after a verdict by the jury recommending that no death penalty be imposed constitutes double jeopardy, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §14 of the Constitution of Indiana. Said action further violates Article 1, §19 of the Constitution of Indiana which gives to the jury, in criminal cases, the right to determine the law and the facts.
>
> The Court, in imposing the death penalty, failed to make the required factual findings as set forth in IC 35-50-2-9. In addition, the aggravating circumstances listed by the Court in imposing the death sentence are not those set forth in IC 35-50-2-9, and some of those factors listed as aggravating circumstances by the Court are in fact mitigating circumstances as defined by IC 35-50-2-9. Further, the Court considers evidence outside of the record and not presented to the jury. The imposition of the death penalty under these circumstances constitutes cruel and unusual punishment and a violation of due process of law in contravention of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, §§12 and 16 of the Constitution of

Indiana."

The petitioner's motion to correct errors was overruled on December 1, 1981. He then prosecuted his appeal to the Indiana Supreme Court, reiterating in his appellant's brief the questions here urged.

On June 25, 1982, during the pendency of the appellate proceedings before the Indiana Supreme Court, the respondent filed a Verified Petition for Writ of Certiorari to Supplement the Record of the Proceedings requesting the Indiana Supreme Court to "issue its order to the Brown Circuit Court, commanding the Judge there to make his written findings and conclusions as to the statutory grounds relied upon in imposing the sentence of death, and to certify the same to the Clerk of this Court forthwith."

The petitioner filed written objections to the granting of respondent's petition, arguing, inter alia "To order that the trial judge make additional findings of fact necessary to impose the death penalty, at this late stage, would twice place the appellant in jeopardy as proscribed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §14 of the Constitution of Indiana." The respondent's petition was granted by order of the Indiana Supreme Court dated February 11, 1983.

On February 22, 1983, the trial court filed its "Nunc pro tunc entry, pronouncement of sentencing" which is set out in Appendix D. As permitted by the February 11, 1983 order of the Indiana Supreme Court, the petitioner filed a Brief in Opposition to the Trial Court's Nunc Pro Tunc Entry. In it, he restated his objections based on grounds of double jeopardy, and in addition argued that he had been denied the right to be present and be heard at the time of resentencing, that the trial court had failed to consider the jury's verdict as to the sentence, and that the trial court's interpretation of the applicable Indiana statutes operated as a mandatory imposition of the death penalty.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A state court of last resort has decided federal questions in a way in conflict with decisions of this Court.

I. The review procedures established by I.C. 35-50-2-9 and adopted by the Indiana Supreme Court do not insure that the death penalty in the State of Indiana will not be inflicted in an arbitrary and capricous manner.

The Indiana death penalty statute, I.C. 35-50-2-9 (Appendix C) sets out the following requirements concerning review of a decision to impose a penalty of death:

> "A death sentence is subject to automatic review by the Indiana Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review."

The Indiana Supreme Court has never adopted formal rules regarding its standard of review in death penalty cases. Instead it has assembled an amalgam of statutes and court rules relating to sentences in general. As a result, the review undertaken where the death penalty is imposed in the State of Indiana is as follows:

1. The conviction and sentence of death is automatically appealable to the Indiana Supreme Court (I.C. 35-50-2-9 and Rule 4(A)(7), Indiana Rules of Appellate Procedure).

2. A written statement must be filed by the trial court setting forth the aggravating circumstances it found to exist and its reasons for imposing the particular sentence. (I.C. 35-4.1-4-3)

3. At the time of review, the Indiana Supreme Court will have before it the entire record of the proceedings, including trial transcript, presentence report and transcript of the sentencing hearing. Judy v. State, 416 N.E.2d 95 (Ind., 1981)

4. The Supreme Court, based on the above, will then determine whether the sentence is "manifestly unreasonable in light of

the nature of the offense and the character of the offender. . . . A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed." (Rule 2, Indiana Rules for the Appellate Review of Sentences)

Does such a procedure comply with this Court's holding in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that the death penalty could not be imposed in a manner and under a statutory scheme which created a substantial risk that it would be inflicted in an arbitrary and capricious manner?

Petitioner's first and primary attack on the Indiana death penalty statutes is the total absence of any type of proportionality review. In approving the procedures established for the imposition of the death penalty in Georgia and Florida, this Court, in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) commented at length on the system of reivew required by the respective appellate courts. Specifically mentioned, again at length, was the fact that in each state, either by statutory mandate or appellate decision, the reviewing court was required to compare the decision to impose the death penalty in the case before them with the decisions of judges and juries in similar cases.

In the most recent death penalty cases, Zant v. Stephens, 462 U.S. ____, 103 S.Ct. 2633, 76 L.Ed.2d ____ (1983) and Barclay v. Florida, 463 U.S. ____, 103 S.Ct. 3418, 76 L.Ed.2d ____ (1983), this Court, in affirming the imposition of the death sentence, emphasized that its decision to do so was based in part upon state review procedures which insured that the death penalty would be consistently applied in cases similar in nature.

In fact, this Court itself has engaged in a form of proportionality review in vacating the petitioners' sentences of death in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982

(1977) (rape) and in Enmund v. Florida, ____U.S.____, 102 S.Ct. ____, 73 L.Ed.2d 1140 (1982) (accomplice to murder which was not performed or intended by the defendant).

The Indiana death penalty statute and the rules of review utilized by the Indiana Supreme Court in no way insure that the death penalty imposed in a specific case will be consistent with the decisions of judges and juries in similar cases. A brief review of post-Furman death penalty decisions in Indiana is illustrative:

Six death penalty cases, including the petitioner's, have been reviewed on appeal since 1981. Besides petitioner's, these are Judy v. State, 416 N.E.2d 95 (Ind. 1981), Brewer v. State, 417 N.E.2d 889 (Ind., 1981), Williams v. State, 430 N.E.2d 759 (Ind., 1982), Lowery v. State, 434 N.E.2d 868 (Ind., 1982), and Daniels v. State, ____ N.E.2d ____ (Ind., 1983) (No. 380 S 66, decided Sept. 9, 1983). Lowery v. State, supra, was reversed based upon the trial court's failure to sequester the jury. In the remaining five, the decision of the trial court to impose the death penalty was upheld. In all cases but petitioner's, the jury had recommended death, and the trial court had followed that recommendation.

In that same period of time, at least eight cases have been decided by the Indiana Supreme Court where the death penalty had originally been requested but was not imposed by the trial court. These are as follows: Suggs v. State, 428 N.E.2d 226 (Ind., 1981), Felden v. State, 437 N.E.2d 986 (Ind., 1982), Dunaway v. State, 440 N.E.2d 682 (Ind., 1982), Lowry v. State, 440 N.E.2d 1123 (Ind., 1982), Hoskins v. State, 441 N.E.2d 419 (Ind., 1982), Johnson v. State, 442 N.E.2d 1065 (Ind., 1982), Miller v. State, 448 N.E.2d 293 (Ind., 1983), and Peterson v. State, 448 N.E.2d 673 (Ind., 1983). In at least six of these, Felden, Dunaway, Lowry, Johnson, Miller and Peterson, the jury returned a verdict at the sentencing hearing that the death penalty not be imposed, which verdict was

followed by the trial court.

In what ways is the petitioner's case similar to that of the other defendants whose death sentence was upheld and dissimilar, for example, from that of the defendant in Dunaway v. State, supra, who, after having sex with the victim, murdered her by cutting her throat, or from the defendant in Miller v. State, supra, who killed a two year old girl after sodomizing her? Under the Indiana scheme of review, those questions will never be answered, thus leaving the decision as to whether to impose the death penalty in potentially similar cases to the whim and caprice of the respective trial judges.

Secondly, this Court in Proffitt v. Florida, supra, cited as an additional safeguard the fact that the Florida Supreme Court will sustain a sentence of death following a jury recommendation of life only where "the facts suggesting a sentence of death (are) so clear and convincing that no reasonable person could differ." Proffitt v. Florida, supra at 249, 96 S.Ct. 2960, 59 L.Ed.2d 913, 921. That safeguard is not only not present in Indiana, but has in fact been turned on end.

As no new facts were contained in the presentence report, the judge and jury in the petitioner's case heard the same evidence concerning the sentence to be imposed, yet obviously disagreed. The Indiana Supreme Court, in its opinion, gave no particular weight to the jury's sentencing verdict, holding that it will reverse a trial court's sentence of death only where no reasonable person could find such sentence appropriate. (Rule 2, Indiana Rules for the Appellate Review of Sentences) This standard, the same that is applied to the Court's review of any sentence before it, does not insure that the death penalty in Indiana will not be arbitrarily imposed, particularly in light of the lack of porportionality review, and in no way rationally distinguishes those cases in which the death penalty is imposed from those in which it is not.

Of the eighteen presumably rational people who have had the duty of deciding whether the petitioner should be put to death (12 jurors, the trial judge, and five members of the Indiana Supreme Court), fourteen have determined that the petitioner should not have received the sentence imposed. If the imposition of the death penalty is to be rationally explained and discretion channeled, some standard, other than that of manifest unreasonableness, must be utilized to review those cases where such a difference of opinion exists.

II. The remand by the Indiana Supreme Court for additional factual findings twice placed the petitioner in jeopardy.

The Indiana death penalty statute, I.C. 35-50-2-9 requires that before a judge may impose the death sentence, he or she must find that the State has proved one of nine aggravating circumstances beyond a reasonable doubt and that the statutory aggravating circumstances outweigh any mitigating circumstances which exist. In the trial court's sentencing findings filed on October 2, 1981 (Appendix C), it did not find that the state had proved any one of the statutory aggravating circumstances beyond a reasonable doubt. In addition, the "aggravating" circumstances which it did find to exist were facts which could arguably be considered in mitigation, e.g. that the petitioner was suffering from various types of recognized mental illnesses. While this Court has never directly decided whether a sentence of death premised on such findings would be upheld, it has strongly indicated that it would not, based on due process grounds. Zant v. Stephens, supra.

The petitioner argued that the judge's findings did not support the sentence imposed both in his motion to correct errors filed with the trial court and in his brief on appeal to the Supreme Court of Indiana. After the filing of petitioner's brief with the Indiana Supreme Court, the respondent filed its Verified Petition for Writ of Certiorari to Supplement the Record, admit-

ting that the trial court erred in its findings and asking that the trial judge be ordered to amend those findings to "include the statutory grounds relied upon in imposing the sentence of death." The respondent's petition was granted over petitioner's objections, and the trial court filed its nunc pro tunc entry which is set out in Appendix D.

In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court held that jeopardy would attach to a jury's verdict at a death penalty sentencing hearing where the sentencing hearing itself had the characteristics of a trial on guilt or innocence. The Indiana death penalty statute, I.C. 35-50-2-9, is similar in all respects but one to the statute involved in Bullington.

Indiana, like Missouri, requires a bifurcated proceeding where the burden is upon the State to prove the existence of one or more previously alleged statutory aggravating circumstances beyond a reasonable doubt. At the sentencing hearing, both parties may introduce evidence in aggravation or mitigation and argue their respective positions to the jury. The jury then retires to deliberate on its verdict, after having been instructed as to the tests set out in I.C. 35-50-2-9. After the filing of a presentence report (I.C. 35-4.1-4-9); the judge makes his decision, based on the same standards that the jury was required to consider." I.C. 35-4.1-4-3 and I.C. 35-4.1-4-5 further provide for the introduction of additional evidence and argument at the sentencing hearing conducted before the court. The main distinction is that, unlike Missouri, Indiana does not make a jury verdict that the death penalty not be imposed binding.

Both Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 held that the Double Jeopardy Clause of the Fifth Amendment would bar a retrial where a conviction is reversed at the appellate level for insufficiency of the evidence.

A similar situation is present in petitioner's case. The findings of fact made by the court as the result of the sentencing "trial" were insufficient to support the sentence imposed. This fact was conceded by the respondent and the Indiana Supreme Court alike. The Indiana Supreme Court's order that the trial court correct its findings was a determination by them that the evidence as found by the lower court was insufficient to support the sentencing "verdict". As jeopardy had attached, however, under this Court's holding in Bullington v. Missouri, supra, permitting a redetermination of the evidence and resentencing twice placed the petitioner in jeopardy in violation of the Fifth Amendment.

In addition, the petitioner was not given an opportunity to present evidence, argument of counsel or in any way be present or participate in the procedure whereby the trial court reweighed and redetermined the evidence pertaining to his sentence. The requirements of the Due Process Clause must be satisfied in the sentencing process as well as the trial itself. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). That case also recognized the "importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases". Id. at 360, 97 S.Ct. 1197, 51 L.Ed.2d 393, 403.

The remand by the Indiana Supreme Court required nothing less than a complete re-evaluation of the evidence of the entire trial as it related to the sentence to be imposed and a redetermination of that sentence. Petitioner, however, was afforded no opportunity to take part in this critical process which would determine whether he lived or died.

III. The petitioner was twice placed in jeopardy with reference to his sentence for the reason that the Indiana death penalty statute makes the verdict of the jury as to the sentence advisory only.

I.C. 35-50-2-9 (Appendix B) states that the jury, after the

sentencing hearing, shall recommend whether the death penalty shall be imposed. As determined by the Indiana Supreme Court on petitioner's state appeal, the verdict of the jury on sentencing is advisory only and need not be followed by the trial court regardless of whether the verdict is in favor of or against the death penalty.

According to the latest compilation available to petitioner, Indiana is one of only three states of those who permit jury participation in the sentencing phase of capital cases that do not make a jury recommendation of life binding on the trial court. (The others being Florida and Alabama.) Twenty-eight other states make a jury recommendation of life (or more correctly, that the death penalty not be imposed) binding.

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d (1981), discussed supra, held that due to the trial-like nature of the Missouri capital crime sentencing procedure, jeopardy would attach to a jury's rejection of the death sentence. As pointed out in the preceding section, Indiana's sentencing procedure is virtually identical to that established in Missouri with the exception of the binding effect in Missouri of a jury's recommendation of life.

As expressed in United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id. at 127-128, 101 S.Ct. 426, 66 L. Ed.2d 328, 339 (1980).

The Indiana system creates two full-blown trials regarding the sentence to be imposed, one before the jury and one before the

court. If the State fails in its burden of proof in the first before the jury, it is given an unfettered opportunity to try again to meet its burden in its presentation to the trial court. Even assuming the present procedure--that the jury's verdict is advisory only--no defendant charged with a capital offense is going to ignore the potential value of a verdict by twelve citizens in his favor as to the sentence to be imposed. The "embarrassment * and ordeal, * * * anxiety and insecurity" of the sentencing trial before the jury are certainly as great as the second hearing conducted before the trial judge.

A jury verdict of acquittal, no matter how erroneous, has traditionally been afforded absolute finality. United States v. DiFrancesco, supra; Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Under the Indiana procedure utilized in petitioner's case, the State had the burden of proving one or more of the statutory aggravating circumstances beyond a reasonable doubt. Since the jury in Indiana is not required to render written findings, it is impossible to conclusively determine upon what basis they voted to not impose the death penalty in petitioner's case. One possible basis, however, is that the State simply failed to meet its burden. To allow the sentence to be relitigated before the trial judge is to give the State the "second bite of the apple" forbidden by the Double Jeopardy Clause of the Fifth Amendment.

A limited form of "continuing jeopardy" was approved by this Court in Swisher v. Brady, 437 U.S. 204, 98 S.Ct. 2699, 57 L.Ed. 2d 705 (1978). In that case it was held that the Double Jeopardy Clause presented no bar to a review by a juvenile court judge of the findings and recommendations of masters.

The Swisher Court held that the statute there in question did not afford the prosecution a "second crack" at the defendant as the State could not present additional evidence unless the defendant consented. Thus the central purpose of the Double Jeopardy

Clause, to provide the prosecution with another opportunity to supply evidence which it failed to muster initially, was not violated. In Indiana, there is, of necessity, a delay between the return of the jury's verdict on sentencing and the sentencing hearing before the court, to allow for the preparation of the presentence report. Nothing prevents the State from presenting whatever evidence it desires at this second later sentencing hearing.

In Swisher it was also held that the juvenile court procedure at issue did not subject a juvenile defendant to the embarrassment, expense and ordeal of a second trial for the defendant was not even present when the court conducted its review of the master's findings. The Indiana death penalty statute, on the other hand, provides for the defendant's presence at the second sentencing hearing before the court. As pointed out above, having once litigated the issue of his sentence, suffered the ordeal and anxiety of the sentencing hearing before the jury, and having prevailed, he must once again rally his strength and make his defense to the same issues presented to the trial court.

This Court has often said that form should not prevail over substance in determining whether a particular procedure violates the Constitutional prohibition against double jeopardy. The sentencing procedure established in Indiana in capital cases has all the same characteristics of a trial as that statute under consideration in Bullington v. Missouri, supra. The sole difference is that Indiana has labeled the jury's verdict a "recommendation". Had the Indiana legislature so labeled the jury's verdict on guilt or innocence, there is no doubt but that it could not stand. Under the authority of Bullington, the same logical conclusion is reached where the issue is not guilt or innocence but whether the defendant should live or die.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,

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APPENDIX

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APPENDIX A

OPINION AND JUDGMENT OF THE INDIANA SUPREME COURT

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IN THE

SUPREME COURT OF INDIANA

FILED

Marjorie H. O'Laughlin
AUG 5 1983
CLERK OF THE
INDIANA SUPREME AND
COURT OF APPEALS

THOMAS N. SCHIRO,
Defendant-Appellant,

v.

STATE OF INDIANA,
Plaintiff-Appellee

NO. 1181 S 329

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Samuel L. Rosen, Judge

PIVARNIK, J.

Defendant-appellant, Thomas N. Schiro, was convicted of Murder While Committing or Attempting to Commit Rape, Ind. Code §35-42-1-1(2) (Burns Repl. 1979), at the conclusion of a jury trial in Brown Circuit Court on September 12, 1981. The trial court sentenced Schiro to death. He now appeals.

Schiro raises seven errors on appeal, concerning:

1) whether the Indiana death penalty statute, Ind. Code §35-50-2-9 (Burns Repl. 1979), is unconstitutional because it fails to provide for adequate review of death sentences;

2) whether the trial court erred in imposing the death penalty;

3) whether a statement given by Schiro was an involuntary custodial statement and should have been excluded from trial;

4) whether the master commissioner of Vanderburgh Circuit Court had authority to issue search warrants;

5) whether the trial court erred in excluding a letter written by the defendant on the issue of his insanity;

6) whether the trial court supplied the jury with all the necessary verdict forms; and,

7) whether the pre-sentence report contained improper information.

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on one nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any o'stacles that they face when released from prison. It also housed people who were sent there

for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy". The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m., on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assitance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay". This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and

Luebbehusen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay". Darlene Hopper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle, and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

I

Defendant Schiro's first argument concerns the constitutionality of the Indiana Death Penalty statute, Ind. Code §35-50-2-9 (Burns Repl. 1979). Schiro states specifically that the death penalty does not provide for any proportionality review of death sentences by this Court. According to Schiro, the term "proportionality review" requires that the sentence handed down by the trial court be compared to sentences imposed in similar circumstances. This, Schiro urges, would insure that the death penalty is not arbitrarily and capriciously applied. Since Ind. Code §35-50-2-9 does not explicitly mandate this form of review and

this Court has allegedly failed to engage in such review, Schiro believes that the death penalty statute is unconstitutional.

Schiro admits that two recent cases have upheld the constitutionality of the Indiana death penalty statute. Williams v. State (1982), ___Ind.___, 430 N.E.2d 759, appeal dismissed, (1982) ___U.S.___, 103 S.Ct. 33, 73 L.Ed.2d 47; Brewer v. State, (1981) ___Ind.___, 417 N.E.2d 889, cert. denied, (1982) ___U.S.___, 102 S.Ct. 3510, 73 L.Ed.2d 1384. See also Judy v. State, (1981) ___ Ind.___, 416 N.E.2d 95. Schiro also notes that the United States Supreme Court, in Proffitt v. Florida, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, found the Florida death penalty statute, which is nearly identical to our death penalty statute, to be constitutional. Compare Ind. Code §35-50-2-9 (Burns Repl. 1979) with Fla. Stat. Ann. §921.141 (West Supp. 1983). While conceding that the procedure under our statute may be constitutional, Schiro argues that the following passage from Proffitt indicates the Supreme Court's mandate of proportionality review in cases involving the death penalty:

> "The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon, 283 So.2d 1, 10 (1973)."

428 U.S. at 250-51, 96 S.Ct. at 2966, 49 L.Ed.2d at 922.

Although Schiro has not raised this argument, and without going into great detail, we feel it is incumbent to note that this Court has consistently held that the death penalty does not violate the ban against cruel and unusual punishment, Article 1, §16

the Indiana Constitution. Brewer, supra, 417 N.E.2d at 894; Adams v. State, (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, and cases cited therein. Similarly, the United States Supreme Court has held that the death penalty does not violate the Eighth Amendment of the United States Constitution. Gregg v. Georgia, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; Proffitt v. Florida, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; Jurek v. Texas, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

This Court has comparatively analyzed the Florida death penalty statute, approved in Proffitt, supra, and our own statute at great length. Brewer, supra, 417 N.E.2d at 897; see also Judy v. State, 416 N.E.2d at 107. Both statutes require the following prerequisites before a sentence of death may be imposed and executed:

> "(1) A conviction of murder.
> (2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.
> (3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.
> (4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.
> (5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.
> (6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.
> (7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.
> (8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State."

Brewer, 417 N.E.2d at 897

We also felt in Brewer that Indiana is more restrictive than Florida in applying the death penalty. Indiana law requires that the sentencing hearing be before the same jury that tried the guilt

issue, whereas Florida may, under certain circumstances, impanel a special jury for the hearing. Id. at 898. The standard of proof for a finding of at least one of the aggravating circumstances is beyond a reasonable doubt in Indiana, while Florida does not require a specified standard of proof. Id.

Still, regardless of the above distinctions, defendant Schiro would argue that under Proffitt, Indiana does not engage in a meaningful appellate review of death sentences. We disagree.

We interpreted the United States Supreme Court's holding in Gregg v. Georgia, supra, a companion case to Proffitt, to be that the death penalty may be applied ". . .if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." Brewer, supra, 417 N.E.2d at 897.

It is clear that the imposition of the death sentence under Ind. Code §35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. Judy, supra, 416 N.E.2d at 105. Also, this Court has adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind. R. App. P 4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

"Rule I

AVAILABILITY--COURT

(1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule

provides.

(2) Appellate review of sentence under this rule may not be initiated by the State.

(3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.

Rule 2

SCOPE OF REVIEW

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind. R. App. Rev. Sen. 1 and 2.

In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind. Code §35-4.1-4-3 (§35-50-1A-3) (Burns Repl. 1979), reads as follows:

"SENTENCING HEARING IN FELONY CASES.--Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure

that the evils of Furman v. Georgia, (1972) 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial court judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. Brewer, supra; Judy, supra. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

> ". . . this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute. Proffitt v. Florida, supra, 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. See Gregg v. Georgia, (1976) 428 U.S. 153, 194-95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886-87. Cf. Woodson v. North Carolina, supra; French v. State, supra. The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in Gregg v. Georgia and Proffitt v. Florida, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, supra, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

II

The next issue concerns the trial court's imposition of the death penalty. Defendant Schiro's argument may be divided into four sub-categories:

A. Whether Ind. Code §35-50-2-9 permits a trial court to override a jury's recommendation that the death penalty not be imposed;

B. Whether the procedure established by Ind. Code §35-50-2-9 places a defendant in double jeopardy;

C. Whether the imposition of the death penalty failed to conform to Ind. Code §35-50-2-9; and,

D. Whether this Court, after reviewing the case at hand, should vacate the sentence of death.

A.

Schiro's first dispute is with the following language found in Ind. Code §35-40-2-9:

> "(e) If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed.
>
> ***
>
> (2). . .
> The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Schiro argues that the use of the word "whether" indicates that the sole purpose of the jury at the death penalty hearing is to render a recommendation of death only if it is justified under the facts. The legislative intent would make a jury recommendation of no death penalty binding upon the trial court. If the jury did recommend a sentence of death, the legislature also intended that the trial court could behave as a safety valve by overriding such a recommendation and imposing a sentence of years. Thus, Schiro argues, while a trial court may override a recommen-

dation of death, it may not impose the death penalty if the jury holds otherwise.

We wrote in Foremost Life Ins. Co. v. Dept. of Ins., (1980) ___Ind. ___, ___, 409 N.E.2d 1092, 1095-96:

> "In interpreting a statute we are to ascertain and give effect to the intent of the legislature. State ex rel. Baker v. Grange, (1929) 200 Ind. 506, 510, 165 N.E. 239, 240; Ervin v. Review Bd., (1977) Ind.App., 364 N.E.2d 1189, 1192; Abrams v. Legbrandt, (1974) 160 Ind.App. 379, 388, 312 N.E.2d 113, 118; Marhoefer Packing Co. v. Indiana Dept. of State Revenue, (1973) 157 Ind.App. 505, 516, 301 N.E.2d 209, 214.
>
> In determining the legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue. . . Further, a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. Combs v. Cook, (1958) 238 Ind. 392, 397, 151 N.E.2d 144, 147; Abrams v. Legbrandt, supra."

The American Heritage Dictionary (1971 ed.) in its definition of "whether" says the word is "[u]sed in indirect questions to introduce one alternative: We should find out whether the museum is open." Using the accepted definition of "whether", we find that under Ind. Code §35-50-2-9, the jury is mandated to make a choice between the death penalty or no death penalty. Therefore, Schiro's argument, that the statute only allows the jury to recommend the death penalty, fails, and because of this, his assertion that the trial court may only reject death penalty recommendations also fails. We would also note that Schiro's premise (a recommendation against the death penalty is binding upon the trial court) thwarts legislative intent. Ind. Code §35-50-1-1 (Burns Repl. 1979) abolished the jury's role in determining or setting a sentence. Debose v. State, (1979) ___Ind.___, ___, 389 N.E.2d 272, 273. If we accept Schiro's argument, the trial court would be severely limited in imposing sentence under Ind. Code §35-50-2-9 whenever a jury voted against the death penalty. Under

the defendant's reasoning, the trial court would have no choice but to impose a term of years. Such action goes against the legislative intent of removing the jury's role in sentencing defendants. The jury plays an advisory role under Ind. Code §35-50-2-9(e) and the trial court may properly override a jury's recommendation.

B.

Schiro next argues that he was placed in double jeopardy because the trial court ignored the jury's recommendation and sentenced him to death. Having been given the chance to seek the death penalty before the jury, the State, Schiro urges, should not be given a second chance to litigate the same issues before the trial court. Schiro cites Bullington v. Missouri, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 in support of his position.

The Double Jeopardy Clause of the Fifth Amendment provides,

> ". . . that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' The Double Jeopardy Clause was made applicable to the states through the Fourteenth Amendment in Benton v. Maryland, (1969) 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The Clause has been held to embody three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment for the same offense. North Carolina v. Pearce, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656."

Elmore v. State, (1978) 269 Ind. 532, 533-34, 382 N.E.2d 893, 894.

Defendant Schiro's reliance on Bullington, supra, is misleading. Missouri law explicitly requires the jury, not the trial court, to impose the death penalty in cases tried before a jury. Mo.Ann.Stat. §565.006 (Vernon 1979). This involves a bifurcated proceeding where, after the defendant is convicted, the prosecution offers evidence in support of the death penalty. This hearing must be held before the same jury that convicted the defendant

of murder. The jury must find at least one aggravating circumstance beyond a reasonable doubt and put its findings in writing. A jury's decision to impose the death penalty must be unanimous; if it cannot reach a decision, the alternative sentence of life imprisonment is imposed.

In Bullington, the defendant was convicted of murder but the jury fixed his punishment at life imprisonment. While the defendant's motion for a new trial or judgment of acquittal was pending, the United States Supreme Court decided Duren v. Missouri, (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. That case held that the Missouri law allowing women to be exempted from jury duty deprived a defendant of his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community. The trial court, relying on Duren, granted a new trial for defendant Bullington.

Defendant was again convicted of murder and the State sought the death penalty. The United States Supreme Court held that the second seeking of the death penalty, under the Missouri statute, violated the proscription against double jeopardy. The bifurcated proceeding requires the jury to determine whether the prosecution has proved its case. Analogizing the first jury's decision to impose life imprisonment to that of an acquittal (i.e., the jury could not find an aggravating circumstance beyond a reasonable doubt sufficient to impose a death sentence), and holding, of course, that an acquittal is absolutely final, the Supreme Court wrote that the prosecution is not entitled to another chance at the death penalty. 451 U.S. at 446, 101 S.Ct. at 1861-62, 68 L.Ed.2d at 283.

As the facts illustrate, Bullington was a unique decision that is clearly distinguishable from the situation presented here. Prior decisions held that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence on retrial, North Carolina v. Pearce, supra, but Bullington found an exception to

that rule. The Supreme Court ruled that the Missouri sentencing hearing had the hallmarks of a trial on guilt or innocence. All issues are decided, reduced to written findings, and made binding since the jury's decision is the final determination of the sentence. In Indiana, the jury does not make a final determination of the sentence. It only releases an opinion of its recommendation, not an ultimate determination.

Schiro also argues that the jury's recommendation shows that the State failed to prove an aggravating circumstance beyond a reasonable doubt. This is not necessarily so. The statute does not require the jury to list its reasons for the recommendation. It could well be that a jury found the aggravating circumstance to be present, but felt it was outweighed by mitigating circumstances. The judge's determination is based on the same standards as the jury's recommendation and he determines whether the aggravating circumstance has been proved beyond a reasonable doubt. His findings are put in writing so that we may adequately reivew them on appeal. The judge's determination was the completion of a single trial process of which the jury recommendation was only an intermediate stage. We find no error in the procedure used by the trial court in rejecting the jury's recommendation.

C.

The original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty. We ordered the trial court to make written findings in this case, setting out the aggravating circumstances, if any, as specified in Ind. Code §35-50-2-9. At the same time we afforded defendant Schiro the opportunity to file a brief contesting the nunc pro tunc entry of the trial court. The State was given the opportunity to oppose the defendant's brief. In the brief, Schiro argues that the nunc pro tunc entry is inappropriate; that he has been twice placed in jeopardy; and that the nunc pro tunc

entry does not comply with Ind. Code §35-50-2-9.

The State counters Schiro's first argument by contending that the nunc pro tunc entry simply restates the trial court's findings so that they conform with the requirements of Ind. Code §35-50-2-9. A nunc pro tunc entry is

> "'an entry made now of somethin which was actually previously done, to have effect as of the former date.' Perkins v. Hayward, (1892) 132 Ind. 95, 31 N.E. 670. Such entries may provide a record of an act or event of which no reference at all is made in the court's order book, as was the case in Neuenschwander v. State, (1928) 200 Ind. 64, 161 N.E. 369, and Warner v. State, (1924) 194 Ind. 426, 143 N.E. 288, or they may serve to change or supplement an entry already existing in the order book as was the case in Apple v. Greenfield Banking Co., (1971) 255 Ind. 602, 266 N.E.2d 13, and Perkins v. Hayward, supra. Such entries must be based upon written memoranda, notes, or other memorials which (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneous with or preceding the date of the action described. Blum's Lumber & Crating, Inc. v. James et al., and State ex rel. Baertich v. Perry County Council et al., (1972) 259 Ind. 220, 285 N.E.2d 822; O'Malia v. State, (1934) 207 Ind. 308, 192 N.E. 435; Schoonover v. Reed, (1879) 65 Ind. 313; Pittsburgh etc. R. Co. v. Lamm, (1916) 61 Ind.App. 389, 112 N.E. 45."

Stowers v. State, (1977) 266 Ind. 403, 410-11, 363 N.E.2d 978, 983. There has been precedent for nunc pro tunc entries in death penalty cases. In Judy v. State, supra, the record of the proceedings did not contain the written findings required in death penalty cases. The case was remanded and the trial court was instructed to enter written findings made nunc pro tunc effective the date of the sentencing hearing. Such actions are also common in cases involving enhanced sentences where the trial court does not comply fully with the mandate of Gardner v. State, (1979) 270 Ind. 627, 388 N.E.2d 513. See e.g., Alleyn v. State, (1981) ___ Ind.___, 427 N.E.2d 1095. We request this specificity upon review

so that

> "we [may] fulfill our responsibility to review the trial court's exercise of its judicial discretion. The trial court's statement is important also because it further serves to enlighten the defendant and the community as to the trial court's reasons for the imposition of an enhanced sentence, thereby greatly bolstering the public's confidence in the fairness and justice of our State's judicial process."

Spinks v. State, (1982) ___Ind.___, ___, 437 N.E.2d 963, 968.

In a recent case, Eddings v. Oklahoma, (1982) 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the United States Supreme Court remanded a death penalty case to the Oklahoma Court of Criminal Appeals. The trial court had refused to consider, as a matter of law, the defendant's character and record of family history as a possible mitigating factor. The Supreme Court ruled that this was error and vacated the death sentence but at the same time remanded the case to the Oklahoma courts. It was made very clear that the Supreme Court would not weigh this evidence of family background; that was the role for the Oklahoma courts. Thus, the death penalty could be reinstated on remand if the Oklahoma courts found that the defendant's background was not sufficient to outweigh imposition of the death sentence.

We also found it proper to remand this cause and order the trial court to comply fully with the death penalty statute. We did not demand a new decision; instead, we simply requested that the trial court provide its reasons for the harsher sentencing and these particular findings must be in the proper form. Only then may we adequately review the imposition of the death sentence. Ind. Code §35-50-2-9 lists only nine aggravating circumstances which may be used in seeking the death penalty. In this case, it appears that the trial court listed wrongly as aggravating circumstances its counter-arguments to any possible mitigating circumstances available to the defendant. Thus, to ensure fairness to both sides, and to make certain that proper considerations

were utilized by the trial court in imposing sentence, we felt that remanding the case so that the written findings conform with the death penalty statute was the proper remedy.

In support of his double jeopardy argument, defendant Schiro again cites Bullington, supra, Issue IIB. Without going into great detail, we determined above that Bullington is not controlling on this matter. Here a judgment of death had been entered. All we requested was that the trial court put its findings in the proper form. No new determination of sentence was made, no new evidence was presented, and no reweighing of the facts took place. We fail to see how double jeopardy attached by remanding this cause for compliance with Ind. Code §35-50-2-9.

Finally, Schiro argues that the nunc pro tunc entry does not comply with Ind. Code §35-50-2-9 for two reasons: first, the trial court did not take the jury's recommendation into consideration; and, second, that the trial court did not exercise any discretion but instead felt that the death sentence had to be mandatorily imposed.

Ind. Code §35-50-2-9(e) reads that the "[trial] court shall make the final determination of the sentence, after considering the jury's recommendation. . . " Schiro insists that the trial court failed to do this. An examination of the nunc pro tunc entry, however, reveals just the opposite. The trial court specifically stated that the jury had unanimously recommended that the death penalty not be imposed. Thus, the trial court was aware and cognizant of the jury's recommendation. Later, the trial court stated that the defendant continually "rocked" only in the jury's presence, and that this "fact may well have influenced and misled the jury in its recommendation." It is evident that the trial court did consider the jury's recommendation.

Schiro also takes issue with a passage in the nunc pro tunc entry. After carefully weighing all the mitigating circumstances, the trial court stated that "the death sentence is required by the

Statutes of the State of Indiana. This Court has no choice but to follow the law." Schiro argues that this makes for a mandatory imposition of the death penalty.

The imposition of a mandatory death penalty is contrary to constitutional considerations. Woodson v. North Carolina, (1976) 248 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; French v. State, (1977) 266 Ind. 276, 362 N.E.2d 834. The entire nunc pro tunc entry illustrates that the trial court felt that the requirements of the law, which calls for the death penalty only after strict consideration of all possible mitigating circumstances, had been satisfied. Perusal of the record shows that after careful consideration, the death penalty was deserved and justified. The language of the trial court may appear awkward but nowhere has the trial court or this Court attempted to apply anything resembling a mandatory death penalty. The nunc pro tunc entry complies with Ind. Code §35-50-2-9.

D.

In this last sub-paragraph of Issue II, Schiro urges this Court to overturn the death penalty. The main basis for this contention is that the trial court rejected the jury's recommendation that no death penalty be imposed. Schiro believes this Court should impose a stricter standard of review in situations where the trial court and jury disagree about the imposition of a sentence of death.

It is true that in Gregg v. Georgia, supra, the United States Supreme Court spoke of the important society function fulfilled by jury sentencing. 428 U.S. at 181-82, 96 S.Ct. at 2929, 49 L.Ed.2d at 879. But on the same day, in a companion case, Proffitt v. Florida, supra, the Supreme Court pointed out that it

> "has never suggested that jury sentencing is constitionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital

> punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 923.

In Issue I, we discussed the great care and scrutiny that goes into the review of all death penalty cases. While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagrees about the imposition of the death penalty. Trial courts are presumed to know and understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. It may be that a jury which is to be involved in a capital case only once would be reluctant to impose this most severe form of punishment. This is not to say that all juries would be reluctant to do so, nor that trial courts are more callous and more inclined to impose a sentence of death. Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater consistency in sentencing. Furthermore, this Court, using the existing standards for appellate review of sentences, will insure that the death penalty is not imposed where it is unreasonable to do so. We will not engage in a different standard of review where jury and trial court disagree.

After disposing of the defendant's four separate sub-categories, we now turn to examine whether the sentence of death is appropriate. The transcript of the sentencing hearing and the trial court's written findings show that the court found that Schiro intentionally killed Laura Luebbehusen while committing or attempting to commit rape. After examining the record, we agree with the trial court's findings. Mary Lee and Dr. Frank Osanka recounted the events as told to them by Schiro. Schiro saw the victim a couple

of times prior to the day of the murder. He made up his mind that he would rape her and perform his "ritual". After work, Schiro pretended that his car broke down and thus gained access to Luebbehusen's apartment by requesting assistance. Once inside, Schiro persuaded her that he was homosexual but they eventually had intercourse. Dr. Osanka said he was not certain but he was almost positive that the victim was coerced into such activity. Schiro then attempted to get the victim in a comatose or drowsy state by having her consume alcohol and pills. One of his fantasies was to work in a funeral parlor and make love to the bodies of dead women. Sometime during this process Schiro fell asleep but awakened when the victim tried to escape. He grabbed her, pulled her back in, and raped her. Later they left to purchase some alcohol and then returned, at which time Schiro raped the victim again.

Schiro fell asleep on the couch but awoke when the victim again tried to escape. This time Luebbehusen was fully dressed. Schiro forced her to lie down on the bed beside him. He believed that she fell asleep or passed out. At that point he decided to kill her. Grabbing a vodka bottle, he smacked it against her head and it broke. Luebbehusen started to protest but Schiro grabbed an iron and continued to beat her. Finally, he grabbed the victim around the neck and strangled her. Schiro then began his "ritual." He dragged the corpse into another room, undressed it, and sexually and sadistically assaulted it.

As for the mitigating factors, the trial court did not find any. The court found that the defendant had been engaged in numerous instances of prior criminal conduct. Psychiatrists testified to Schiro's numerous rapes and other criminal deviate conduct. Mary Lee testified about Schiro's sadistic assaults on her child. Another witness testified that Schiro raped her in the presence of her child. Although the defendant related instances of sexual perversion, sadism, necrophilia, exhibitionism, and

voyeurism, both of the court-appointed psychiatrists felt that Schiro was in good contact with reality. Both men testified that Schiro was not insane, showed no remorse, was violent and sadistic, and both thought him to be a danger to the community.

The trial court said the defendant attempted to conceal his crime, thereby showing his appreciation for the wrongfulness of his conduct. The court also thought Schiro tried to delude the jurors into thinking he was mentally unstable by rocking back and forth only in their presence. The trial court failed to find that Schiro's age, twenty years, was a mitigating factor.

We find that with the submission of the nunc pro tunc entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstance that Thomas Schiro intentionally killed Laura Lubbehusen. Although the record shows that Schiro engaged in bizarre sexual perversions at an early age and for some length of time, we also find that the evidence, as attested to by psychiatrists, indicated he could have conformed his conduct to the law. Such pitiful behavior should not serve as an excuse for the atrocious acts in this matter. The facts in the record, which show the horrifying nature of this rape/murder and the character of this offender, and the compliance of the trial court with the procedures of Ind. Code §35-50-2-9, lead us to conclude that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate. The trial court is affirmed in the imposition of the death penalty.

III

Schiro argues on appeal that the statement he gave to Ken Hood, in which he admitted killing Laura Lubbehusen should have been suppressed at trial. He claims that his confession was the result of a custodial interrogation and Ken Hood failed to give Miranda warnings prior to Schiro's statement. Schiro also argues that the illegal statement taints all evidence seized

as a result of his confession. Such evidence would include Mary Lee's testimony because the police were directed to her through the statement, and objects taken from Schiro's room. Schiro feels that this evidence should have been excluded from the trial.

Miranda warnings, Miranda v. Arizona, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not have to be given in all interrogations. In Johnson v. State, (1978) 269 Ind. 370, 375-76, 380 N.E.2d 1236, 1240, this Court wrote:

> "It is settled that the procedural safeguards of Miranda only apply to what the United States Supreme Court has termed 'custodial interrogation.' Oregon v. Mathiason (1977) 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; Bugg v. State, (1978) Ind., 372 N.E.2d 1156, 1158. Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Mathiason, supra, 429 U.S. at 494, 97 S.Ct. at 711, 50 L.Ed.2d at 719. The concept of custodial interrogation does not operate to extend the Miranda safeguards to spontaneous voluntary statements, i.e. statements which are either not made in response to questions posed by law enforcement officers while the defendant is in custody, Bugg v. State, supra, or statements which are made before the officers are given an opportunity to administer the Miranda warnings. New v. State (1970) 254 Ind. 307, 259 N.E.2d 696."

Schiro argues that Ken Hood was a law enforcement officer who interrogated him in Hood's office. The State strongly argues that Hood, as director of the Second Chance Halfway House, was not a law enforcement officer and no interrogation took place. Both parties have cited other jurisdictions in support of their view on Hood's law enforcement status. We do not find it necessary to determine whether Hood was a law enforcement officer, although Hood stated that he had no ties to any law enforcement agency, was not a sworn peace officer, and was not responsible for the investigation of any criminal activity. From the facts presented in this case, our first point of inquiry is to determine

whether a "custodial interrogation" took place. Cases from both the United States Supreme Court and this Court have stated that Miranda, supra, does not apply outside the inherently coercive custodial interrogation for which it is designed. Roberts v. United States, (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed. 2d 622, 631; Smith v. State, (1981) ___Ind.___,___, 419 N.E.2d 743, 747. We examine all the facts to determine whether custodial interrogation took place.

A perusal of the record covering the suppression hearing and Hood's testimony at trial reveals the following: On the day in question, Schiro approached his work release counselor, a Mr. Williamson, and said that he had something "heavy" to discuss. Williamson was busy checking the sign-in, sign-out sheets to see whether any of the residents were out of the building during the time Laura Lubbehusen was murdered. Williamson was doing this under Hood's direction. Hood stated that while he did not think any of the residents were involved in the murder, he was afraid adverse publicity might arise because the victim's car was found near the Second Chance Halfway House. Therefore, he wanted to counter any possible bad publicity by showing that all the residents were in the facility when the crime occurred. Williamson thought Shicro's problem concerned his alcoholism and said that if it was serious, Schiro should go see Hood. Williamson called Hood and told him Schiro was on his way to discuss a problem.

Hood stated that he and the staff are strictly concerned in treating the individucal resident's problems. In fact, Schiro had been in his office earlier that day and they discussed transferring him to another facility where Schiro could receive better treatment for his drinking problem. When Schiro arrived, Hood said he seemed nervous and upset but did not appear to be under the influence of alcohol or drugs. After ascertaining that Schiro's alcoholism was not the reason for this conversation, Hood started asking Schiro general questions. Hood felt that Schiro

wanted to talk but appeared uncertain as to what he wanted to discuss. Hood thought that some general questions might calm him down. Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney war in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station.

We do not find that these facts show a custodial interrogation took place. Schiro voluntarily wanted to talk to someone about this crime. He was not the object of suspicion by Hood or anyone else, and Hood was only talking to Schiro upon Schiro's request. Schiro argues that under the rules of the facility, he could not leave unless he signed out on authorized business. Thus, he feels that he was in custody anywhere in the building. Hood stated that the residents could move about the facility at their leisure, stroll the grounds, and one door was always left unlocked. Regardless, Hood also said that he was not keeping Schiro in his office and he was free to leave at any time. Schiro was never placed in physical custody or restrained in any way. Schiro approached Hood, not vice versa. We fail to see that Schiro was coerced, either blatantly or inherently, into making a confession. There was no need for Miranda warnings from Hood.

Due to the disposition of the above issue, we also hold that Schiro's confession does not taint all evidence seized as a result of his statement. Therefore, Mary Lee's testimony and evidence

taken from Schiro's room were properly admitted at trial.

IV

Defendant Schiro argues that the search warrant issued by Maurice O'Connor, acting as Master Commissioner of the Vanderburgh Circuit Court, is invalid due to this Court's decision in State ex rel Smith v. Starke Circuit Court, (1981) ___Ind.___, 417 N.E. 2d 1115. Due to the alleged defective nature of the search warrant, which was State's Exhibit 45, Schiro argues that all evidenced seized because of the search warrant, such as his blood-stained coat, should not have been introduced at trial.

Defendant Schiro is in error on this issue. State ex rel. Smith v. Starke Circuit Court dealt with statutes providing for appointment of commissioners by circuit courts of Starke, Vanderburgh, and St. Joseph counties. The opinion was handed down on March 23, 1981, and we held that the holding shall have only prospective application and shall apply to or affect only those cases which had not yet reached final judgment or had not yet had a ruling on the motion to correct errors. Id., 417 N.E.2d at 1124 The search warrant in this cause was issued in February, 1981, and the trial began in September, 1981; therefore, Schiro is correct in stating that his pending trial fell within the ambit of the opinion's prospective application. However, we declared only the following sections to be unconstitutional: Ind. Code §33-4-1-74.4(b); 33-4-1-82.2(b); and 33-4-1-75.1(c) (Burns Supp. 1980). Those sections gave the master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, but we did not hold the power to issue search warrants to be unconstitutional. The statute for Vanderburgh County states in pertinent part that the "master commissioner may conduct preliminary hearings in criminal matters and issue search warrants and arrest warrants and fix bond thereon, and he may enforce court rules." Ind. Code §33-4-1-82.2(a) (Burns Supp. 1982). The search warrant was properly issued and evidence seized was properly in-

troduced at trial.

V

Dr. Walter Abendroth was called by the State to testify about defendant Schiro's mental state. Dr. Abendroth had been treating Schiro prior to the murder. Most of this treatment dealt with Schiro's problem with alcohol and drugs. On cross-examination, the defense attempted to introduce a letter, allegedly written by Schiro, which Mary Lee delivered to Dr. Abendroth. The State objected on lack of foundation of Abendroth's ability to authenticate the letter as one written by Schiro. The trial court sustained the objections. Defendant Schiro argues that the objection should have been overruled because the exhibit was relevant, material, and competent evidence, and was not in violation of any rules of evidence.

In the appellate brief, Schiro also argues that the letter should have been admitted because a plea of insanity "opens wide the door to all evidence relating to the defendant and his environment." Wilson v. State, (1966) 247 Ind. 454, 461, 217 N.E. 2d 147, 151. This is true but exhibits must be sufficiently identified to be admissible in evidence. D.H. v. J.H., (1981) ___ Ind.App.___, 418 N.E.2d 286; Leslie v. Ebner, (1918) 67 Ind.App. 32, 118 N. E. 829. A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown. 13 I.L.E. Evidence §163 (1959); 29 Am. Jr. 2d Evidence §879 (1967).

Dr. Abendroth said he could recognize Schiro's handwriting, probably because he received three or four prior letters from Schiro, but never explained how he knew the letters were actually written by Schiro. Defense counsel never asked Abendroth if he saw Schiro write the letters or if Schiro personally delivered them and said they were written by him. This lack of authentication was the basis for the trial court sustaining the objection to the letter's introduction. Mary Lee, not Schiro, delivered

the letter to Dr. Abendroth. Due to this fact, defense counsel could have had Mary Lee authenticate the letter when she testified later in the trial, but defense counsel failed to do this. We find that in addition to the lack of authenticity, any alleged error on this issue has been waived because defense counsel failed to resubmit the evidence when Mary Lee took the stand.

VI

When thejurors were ready to begin their deliberations, the trial court gave them the following verdict forms:

1) Guilty of Murder as charged in Count I
2) Guilty of Murder/Rape as charged in Count II
3) Guilty of Murder/Deviate Conduct as charged in Count III
4) Guilty of Voluntary Manslaughter
5) Guilty of Involuntary Manslaughter
6) Not guilty
7) Not responsible by reason of insanity
8) Guilty of Murder but mentally ill
9) Guilty of Voluntary Manslaughter but mentally ill
10) Guilty of Involuntary Manslaughter but mentally ill.

The Guilty of Murder/Rape verdict was returned on September 12, 1981. The jury was allowed to go home and was instructed to return on Sepgember 15 for the penalty phase of the trial. Before thejury returned on the 15th, defense counsel made a motion to reject the verdict because two verdict forms were not submitted to the jury. After some discussion this motion was denied and the penalty phase of the trial began. On appeal, defendant Schiro argues that it was reversible error to omit the following forms: Guilty of Murder while committing and attempting to commit rape, but but mentally ill; and Guilty of Murder while committing and attempting to commit Criminal Deviate Conduct but mentally ill.

In Himes v. State, (1980) ___Ind.___, ___, 403 N.E.2d 1377, 1382, this Court wrote:

"We have previously held that when

> the jury was permitted to retire without sufficient forms of verdict, the number of forms submitted cannot be considered as reversible error where the record does not show that the accused tendered or requested any other forms. Bowman v. State, (1934) 207 Ind. 358, 192 N.E. 755; Kirkland v. State, (1956) 235 Ind. 450, 134 N.E. 2d 223."

An examination of the hearing on the September 15th motion reveals that the trial court originally raised the question of insufficient verdict forms. At that time defense counsel did not request that any additional verdict forms be submitted but apparently changed his mind a few days later. Thus, we find no reversible error because defendant failed to request any other verdict forms when the situation was first brought to his attention. Himes, supra.

The trial court also mentioned that Defendant's Instruction 3 informed the jury that the verdict of guilty but mentally ill was submitted to them on all counts of the information. Thus, the jury was informed that the mentally ill verdict applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder. Defendant has failed to show any prejudice on this issue. Johnson v. State (1982) ___Ind.___, ___, 432 N.E.2d 403, 405. There is no reversible error on this issue.

VII

Finally, defense counsel moved to strike a portion of the presentence report which listed certain factors as "aggravating." Defendant Schiro feels that this conclusory language invades the province of the trial court in determining the existence of aggravating and mitigating circumstances under Ind. Code §35-50-2-9. The pre-sentence report recommended that Schiro receive a severe penalty. Defendant moved to have the recommendation section removed from the report, but was overruled by the trial court, although it did delete one sentence which characterized various factors as aggravating circumstances.

Ind. Code §§35-4.1-4-9,-10 (35-50-1A-9,-10) (Burns Repl. 1979) provide for the making of a pre-sentence report in order to assist the judge in sentencing. Some factors the probation officer may take into account include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits." Ind. Code §35-4.1-4-10 (35-50-1A-10). Furthermore, this Court wrote in Lottie v. State, (1980)___Ind.___, ___, 406 N.E.2d 632, 640:

> "[T]he Court of Appeals held [in Halligan v. State, (1978) 375 N.E.2d 1151] that the pre-sentence investigation and report may include any matter which the probation officer deems relevant to the question of sentence. These matters obviously could be in favor of or against the defendant and are presented in the report as a finding or an opinion of the probation officer. The defendant is, of course, given the opportunity to rebut any and all of these matters.... The United States Supreme Court has stated that it is essential for a sentencing judge to be as well informed as possible concerning the defendant's life and characteristics in order to select an appropriate sentence. The Court further stated that '. . . modern concepts individualizing punishment have made it all the more necessary to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' Williams v. New York, (1949) 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337, 1343."

Schiro was given the opportunity to refut the allegations made in the report. It appears that Schiro had a "personality conflict" with the probation officer because she was a woman and he also contested portions of the report wherein he admitted making false statements in order to receive leniency for earlier crimes. The sentencing judge listened patiently to everything Schiro had to say and then gave his decision. Trial court judges are presumed to know and understand the laws of this state. The mere fact that the probation officer labeled certain factors as "aggravating" does not imply that the judge would automatically assume that this is

so. As the record shows, the trial judge did scratch the last reference to "aggravating factors." Defendant Schiro has not shown that any portion of the pre-sentence report was illegal or that it should not have been presented to the trial judge.

We affirm the trial court in all matters and in the imposition of the death penalty. This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

Givan, C. J., and Hunter, J., concur.
DeBruler, J., concurring and dissenting with separate opinion.
Prentice, J., concurring and dissenting with separate opinion.

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IN THE

SUPREME COURT OF INDIANA

FILED

Marjorie H. O'Laughlin
AUG 5 1983
CLERK OF THE
INDIANA SUPREME AND
COURT OF APPEALS

THOMAS N. SCHIRO
Appellant (Defendant Below)

v.

STATE OF INDIANA
Appellee (Plaintiff Below)

NO. 1181 S 329

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Samuel R. Rosen, Judge

PRENTICE, J. -- Concurring and Dissenting

I concur in the result reached by the majority with respect to its affirmance of the conviction of the defendant (appellant). I dissent, however, with respect to its affirmance of the sentence of death.

I.

I concur in part II of Justice DeBruler's dissenting opinion. The findings of the sentencing judge are devoid of any statement that he, himself, found, beyond a reasonable doubt from the evidence, that the defendant intentionally killed Laura Luebbehusen while committing or attempting to commit a rape upon her. I do not question that, under our standard for testing the sufficiency of the evidence upon appellate review, the evidence would have permitted such a finding, but it was not compelled. In the statement of his finding, the trial court judge correctly observed that one of the statutorily provided aggravating circumstances authorizing the imposition of a sentence of death is that the defendant committed murder by intentionally killing the victim. He proceeded to note, in particularity, that the jury had rejected Defendant's plea of insanity. and from this, he apparently concluded either that the jury had found, beyond a reasonable doubt, that the murder had been committed intentionally or that he was warranted in finding, beyond a reasonable doubt, from the jury's rejection of the insanity plea, that the murder had been committed intentionally. Neither would be correct.

Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Luebbehusen intentionally or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her intentionally. The interposition and rejection of the defense of insanity (mental disease or defect) Ind. Code §35-41-3-6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling.

II.

The trial court judge also misconstrued the statute, Ind. Code §35-50-2-9 (Burns 1979), as a mandate to the judge to impose

the death sentence in the event that an aggravating circumstance was found to exist, beyond a reasonable doubt, and that mitigating circumstances, if any, were outweighed by it. Clearly, the statute merely authorizes the imposition of the death sentence, under such circumstances.

Given the existence of one or more of the enumerated aggravating circumstances and the absence of any of the first six (6) mitigating circumstances enumerated under subsection (c) of the statute, the statute mandates neither a recommendation of death by the jury nor the imposition of the death penalty by the judge. Subsection (e) provides that the standards employed by the jury and those employed by the judge be the same, and the seventh (7th) enumerated mitigating circumstance is entirely subjective, i.e., "(7) Any other circumstances appropriate for consideration." It permits unbridled discretion to spare defendants from the supreme penalty.

The majority has said, "The language of the trial court may appear awkward but nowhere has the trial court * * * attempted to apply anything resembling a mandatory death penalty." I emphatically disagree with this statement. The statement of the trial judge, for the most part, was a recitation of the death sentence statute and certain evidence supportive of the sentence. There is nothing contained in the statement of the trial judge, however, that acknowledges that it is he who has determined that the defendant should die. There is nothing contained in the statement to indicate that he understood that it was his burden, under the law, to determine whether the defendant should live or die. Rather, the entire tenor of the findings that closed with the statements, "* * * the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.", reflects that the judge regarded himself as a mere conduit who had the unpleasant ministerial duty to announce a sentence fixed by statute.

The trial judge's comments amply demonstrate his misunderstanding of the standard he was required to apply in reaching the sentencing decision. Ind. Code §35-50-2-9 affirmatively mandates the judge to employ the same standards that the jury was required to consider. That standard is stated as follows:

> "The jury may recommend the death penalty only if it finds: * * *."

In Hoskins v. State, (1982) Ind., 441 N.E.2d 419, 430 (Prentice, J., joined by Hunter, J., concurring) I noted that this standard does not require the imposition of the death penalty under any circumstances whatsoever and that, "It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he may, nevertheless, recommend against imposing it without violating his oath." Similarly, the trial judge may refrain from imposing a sentence of death even though its imposition could not be held to be unreasonable under the circumstances. Moreover, it appears from the context of the judge's comments that, had he believed he had a choice, which he in fact did have under the statute, he would not have sentenced Defendant to death. The record reveals that the death sentence was imposed upon an erroneous standard. Consequently, the matter should be remanded for a new sentencing hearing. State v. Watson, (1982) La., 423 So.2d 1130, 1134-36.

In addition to being convinced that the sentence was imposed upon an erroenous standard, I am also convinced that the provisions of Ind. Code §35-50-2-9, read in conjunction with Federal Due Process requirements concerning capital punishment, require the judge to give considerable weight to the jury's recommendation of mercy and this Court to review a death sentence, imposed contrary to the recommendation of the jury, upon a standard higher than a mere search for manifest unreasonableness as currently required under Ind. R. App. Rev. Sen. 2.

The nunc pro tunc order of February 23, 1983 does not state

how the jury's recommendation was considered nor how much weight it was given by the judge.

The United States Supreme Court considers the jury "a significant and reliable objective index of contemporary values: with respect the imposition of the death penalty. Gregg v. Georgia, (1976) 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879 (plurality opinion of Stewart, J.); Accord Brewer v. State, (1981) Ind., 417 N.E.2d 889, 909. Our Legislature echoed these sentiments when it mandated the trial court to consider the jury's recommendation, Ind. Code §35-50-2-9(e), and by allowing the jury to consider "Any other circumstances appropriate for consideration." Ind. Code §35-50-2-9(c)(7), as a mitigating circumstance. In light of this acknowledged importance of the role of the jury, before a judge may impose a death sentence over a jury recommendation of no death sentence, that judge must articulate written findings, derived from clear and convincing evidence in the record, so that no reasonable person could differ with the determination. This standard, which has been utilized by the Supreme Court of Florida, eg. Cannaday v. State, (1983) Fla., 427 So. 723, 732 (per curiam); Tedder v. State, (1975) Fla. 322 So.2d 908, 910 (per curiam), preserves the defendant's interests in having obtained a favorable jury recommendation after an adversary proceeding. See Bullington v. Missouri, (1981) 451 U.S. 430, 445-46, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 279, 283. Any standard of less stringency detracts from the jury's contribution to the sentencing decision as recognized by the specific legislative directive that the judge consider the jury's recommendation. Given this command, and the statement of public policy that the death penalty is only discretionary even if all the requisite standards of proof are satisfied, in the case where the jury recommends mercy, the Legislature could not have intended that the judge merely disagree in order to override that recommendation. But for mere form, the trial judge may as well have discharged the jury upon

receipt of the verdict upon the issue of guilt. It is clear that he either thought that the death sentence was required by law or that it was unalterably set in his mind. Hypothetically we could not accept a statement that proclaimed: "I find that the State has proven the existence of an aggravating circumstance authorizing a sentence of death, and I find no mitigating circumstances. I further find that the defendant, by erratic conduct during the trial, may have persuaded the jury to recommend mercy - or for reasons unknown, the jury may not be capable of rendering a rational recommendation upon the sentence determination. In any event, I have determined that a sentence of death is authorized by law, warranted by the circumstances and preferred by me. A recommendation of a life sentence by the jury would not alter my decision. I, therefore, dispense with the jury hearing upon the sentencing phase of this matter, and I now order a sentence of death." From a "due process" standpoint, the hypothetical is no more repugnant than the procedure and findings actually employed in this case.

I am also concerned that the trial judge has displayed an apparent misunderstanding of the term "mitigating circumstances," as used in the statute. I am drawn to this conclusion by his statements: "As for mitigating circumstances, the Court finds none.", and, "* * * and the Court finds no mitigating circumstances to outweigh it (the aggravating circumstance)." Whether or not there were mitigating circumstances of such weight as to create a conflict in the mind of a reasonable man upon a determination of the appropriate sentence is not a matter upon which I intend to imply an opinion. However, the record is replete with unrefuted evidence of circumstances which a reasonable man could not but weigh in the balance in making a decision of such gravity. In the main, I refer to the sordid evidence of the defendant's character, a paragon of revulsion which society simply cannot tolerate unfettered. This same evidence, however, also portrays

a sick, rejected and tormented creature who, although legally accountable for his loathsome and despicable conduct is, himself, a victim of forces essentially beyond his control. Whether or not he should be permitted to live by reason of these circumstances, despite his vile crime, is a matter upon which reasonable minds may differ; but human decency, the statute (any other circumstances appropriate for consideration), and due process considerations require that they be weighed in the balance. The denial of the existence of any mitigating circumstances is indicative of the trial judge's misconception of his sentencing responsibility that is likely to have resulted in grievous error.

Additionally, the judge's unbridled discretion to reweigh the evidence under the same standards considered by the jury, which action I am not convinced occurred here, potentially injects the same type of arbitrariness into the system which the Supreme Court has condemned. In cases where the judge and jury disagree, Florida's heightened standard of proof has been implicitly approved as an integral and significant factor in sustaining the constitutionality of the sentencing scheme. Barclay v. Florida, (1983) ___U.S.___, 103 S.Ct. ___ 77 L.Ed.2d ___, 51 U.S.L.W. 5206, 5209 (plurality opinion); Dobbert v. Florida, (1977) 432 U.S. 282, 295-96, 97 S.Ct. 2290-2299, [illegible] L.Ed.2d 344, 357-58; Proffitt v. Florida, (1976) 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913, 921. In light of Ind. Code §35-50-2-9 and the above cited authorities, I am compelled to conclude that this Court's failure to impose a heightened standard of proof upon a judge who seeks to override a jury recommendation of mercy runs afoul of Federal constitutional proscriptions concerning the due process required prior to imposition of the death penalty.

III.

Upon Issue No. V in the majority opinion, I believe that the appropriate standard for authentication has not been provided.

> "Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert to give an opinion as to the genuineness of his signature or handwriting." Spencer v. State, (1958) 237 Ind. 622, 626, 147 N.E.2d 581, 583.

Dr. Abendroth testified that he had received three or four letters from Schiro, and he recalled some of their contents which he related to the court. He was also not equivocal about his ability to identify Defendant's handwriting nor to identify the exhibit at issue.

The majority appears to imply that, because Dr. Abendroth did not swear to knowledge of the origins of the first letters, he was not qualified to identify Defendant's handwriting. I do not understand the connection and note that in Thomas v. State, (1885) 103 Ind. 419, 427-29, 2 N.E. 808, 813-15, no such connection was required. Therein, though the witness produced ten letters, assertedly written by Defendant, before identifying the handwriting on the two letters, exhibits at issue, there was no testimony of how the witness knew that the accused had penned the first ten. Additionally, in this case, there is no showing that Mary Lee, whom the majority asserts could have provided the necessary authentication, did anything more than deliver the letter nor that she had any familiarity with Defendant's handwriting. Consequently, under the majority's ruling, in most cases, only the author of the letter would be able to authenticate it no matter how many times the witness, through whom a party sought to introduce the letter, had received letters from the author of the letter at issue. The law does not impose this onerous burden as the foundation for admitting a letter. Thomas v. State, supra.

However, the trial court has broad discretion in admitting or rejecting writings authenticated only by testimony of a witness who professes to recognize the author's handwriting. Thus, al-

though I do not agree with the majority's conclusion that the letter was inadmissible, neither do I believe that the court committed error by rejecting it, as it was not required to accept Dr. Abendroth's testimony as a sufficiently reliable authentication.

I vote to affirm the trial court's judgment with respect to the conviction of Defendant but to vacate the death sentence and remand the case for a new sentencing hearing.

IN THE

SUPREME COURT OF INDIANA

FILED

Marjorie H. O'Laughlin
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THOMAS N. SCHIRO,
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v.

STATE OF INDIANA,
Appellee.

NO. 1181 S 329

APPEAL FROM BROWN CIRCUIT COURT
Honorable Samuel L. Rosen, Judge

DeBRULER, J. - Concurring and Dissenting

Following the jury sentencing hearing, the jury, after deliberating for one hour, returned a unanimous recommendation that the death penalty not be imposed. Two weeks later at the judge sentencing hearing, the judge overrode that recommendation and sentenced appellant to die. The conviction should be affirmed, but several independent legal grounds exist which require the penalty of death to be vacated.

I.

Upon considerations going to the meaning and spirit of the Double Jeopardy Clause of the Fifth Amendment and the like provision of the Indiana Constitution, Art. 1, §14, a sentencing judge cannot be permitted to override a jury recommendation of no death penalty arrived at pursuant to the death sentence statute, Ind. Code §35-50-2-9. A jury verdict of not guilty on the issue of guilt or innocence is absolutely beyond the authority of judges

to override. Fong Foo v. United States, (1972) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. This fixed and unyielding characteristic of the jury verdict of acquittal exists by reason of the pronouncements of courts that the Double Jeopardy Clauses require it to exist. No state statute or act of Congress can change this. Only a constitutional amendment could do so. Justice Blackmun for the United States Supreme Court in Bullington v. Missouri, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, in referring to the immutability of the verdict of acquittal states:

> "The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die:
>
> > 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.' Green v. United States, 355 U.S., at 187-188, 78 S.Ct., at 223-224.
>
> See also United States v. DiFrancesco, 449 U.S., at 136, 101 S.Ct., at 437. The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' id., at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' Addington v.

Texas, 441 U.S., at 424, 99 S.Ct., at 1808." 451 U.S. at 445-446, 101 S.Ct. at 1861-1962.

That court went on to announce that the sentencing proceeding before the Missouri jury was like the trial on the question of guilt or innocence, and that as a consequence thereof, a resultant jury rejection of the death penalty, by reason of the Double Jeopardy Clause has the same immutable characteristic as the jury verdict of not guilty. Appellant contends that the jury recommendation against imposition of the death penalty under the Indiana death sentence statute should be treated in like manner, and that therefore the sentencing judge in making a final determination of the sentence can have no power to override it and impose death. I agree. The recommendation of the jury against death should have the force of an acquittal of the death sentence, and a recommendation that the death penalty be imposed should have the same force as a verdict of guilty.

Pursuant to the statute the jury reconvenes in court for the sentencing hearing. It is presided over by the judge. The defendant is present with his counsel and the state by its trial prosecutor. Evidence is presented in an adversarial setting. The jury receives the instruction from the court regarding the issues presented which include the question of whether an aggravating circumstance exists and whether it is of such a character as not to be outweighed by mitigating circumstances. The burden is upon the state to prove the aggravating circumstance beyond a reasonable doubt. The lawyers make final arguments to the jury. The jury retires to deliberate and returns into open court with its verdict in the form of a recommendation. This is a full scale jury trial in every sense of those terms. The defendant must surely feel that he is in "direct peril" of receiving the death penalty as he stands to receive the recommendation of the jury. Cf., Green v. United States, (1957) 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

The majority opinion concludes that the Bullington rationale does not apply to the Indiana situation because (1) the recommendation of the jury is not final and binding upon the sentencing judge, as was the case in Missouri, and (2) the recommendation does not necessarily reflect the jury's determination that the State failed in its burden to prove an aggravating circumstance. I cannot agree that these two distinctions rob the Indiana death sentencing hearing before a jury of its trial character and force. It must be evidence that the jury recommendation against imposition of death will have a great and profound persuasive force in determining what choice the judge will make at final determination time. The jury recommendation must be unanimous. Judy v. State, (1981) ____ Ind.____, 416 N.E.2d 95. It is the personal judgment of twelve adult individuals of good will selected from a list comprised of a fair cross section of the community. The judge is also a member of that same community, sharing in its life and experience. The probability is very high that the judge, upon consideration of the recommendation will be brought to the brink of agreement with it in the very nature of things. The jury recommendation against death is so much like a binding decision, that constitutional protection against a second hearing before the judge on the propriety of death should be afforded. Cf., Breed v. Jones, (1975) 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346.

I also cannot agree with the analysis made by the majority of the underlying bases of the jury recommendation of no death in distinguishing this case from Bullington. According to the Indiana statute:

> "(e). . . . The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circum-

> stances that exist are outweighed by the aggravating circumstance or circumstances." Ind. Code §35-50-2-9.

According to this statute, a jury recommendation of no death would have one of two necessary characteristics. Logically, it would either be based upon the jury's determination that the State had failed to establish historical facts constituting an aggravating circumstance, or it would be based upon the jury's determination that the evidence presented had established historical facts constituting some mitigating circumstance. In either event, the judge's later procedure to decide whether the death penalty should be imposed, using "the same standards that the jury was required to consider" would result in a retrial upon the same questions of fact and any decision of the judge to override a jury recommendation of no death including as in the present case his express finding of no mitigating circumstances, would necessarily resolve one of those same questions of fact in a manner contrary to the manner in which the jury resolved it. Under our legal tradition, the determination of fact by a jury in favor of the defendant in a criminal case is not subject to being resolved at a later date by a judge in such a manner as to place the defendant in a worse position.

In the case of United States v. DiFrancesco, (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, it is said:

> "The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." 449 U.S., at 142, 101 S.Ct., at 440.

Here the statutory label is "recommendation". The substance beneath it is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve, that the human qualities which warrant imposition of the death penalty are not present in Thomas N. Schiro. This favorable jury determination was awarded in a fair and open adversarial confron-

tation with the prosecutorial forces of the State. Since that award came from a jury after a full-blown trial, a judge, applying the same rational and specific standards as the jury was required to use, cannot, consistent with the protection of the guarantee against double jeopardy, upon making contrary factual findings, take it away.

II.

The nunc pro tunc entry of the judge first notes that the verdict of the jury finding appellant Schiro guilty of murder while committing or attempting the crime of rape as charged in Count II was returned to court on September 13, 1981. The jury reconvened on September 15, 1981 and a death sentence hearing was held pursuant to Ind. Code §35-50-2-9 resulting that day in a recommendation that the death penalty not be imposed. It further reflects a sentencing hearing was held on October 2, 1981, and continues in part pertinent to the judge's final determination that the sentence of death be imposed:

> "On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written presentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.
>
> These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, Subjection [1] The Aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.
>
> 1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory

rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code §35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows. . . ."

At this point in the entry, the judge notes each mitigating circumstance and upon consideration of evidence rejects each possibility. After proceeding through that, the entry continues:

"Since the State proved beyond a reasonable doubt that existence of at least (1) of the aggravating circumstances alleged', (Indiana Code §35-50-2-9, Section 9[9] and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise."

Indiana Code §35-50-2-9, the death sentence statute, provides in pertinent part as follows:

"(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

> * * *
>
> (c) The mitigating circumstances that may be considered under this section are as follows:
>
> * * *
>
> (d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:
>
> (1) The aggravating circumstances alleged; or
>
> (2) Any of the mitigating circumstances listed in subsection (c) of this section.
>
> (e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.
>
> The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Indiana Code §35-50-2-9(e)(2) requires the sentencing judge to make the final determination of whether the death penalty should be imposed "based upon the same standards that the jury was required to consider." The standards referred to are the two listed in the same paragraph of the statute, the first of which is:

> "(1) That the state has proved

> beyond a reasoneble doubt that at least one of the aggravating circumstances exists; and"

The aggravating circumstance alleged in Count IIA is as follows:

> "(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information..."

According to the requirements of these provisions, it was necessary for the sentencing judge to personally conclude as a trier of fact that the State, at the sentencing hearing before the jury, proved to a moral certainty beyond a reasonable doubt that Thomas Schiro strangled and thus killed Laura Luebbehusen while committing or attempting to commit a rape upon her, and at the time his mind had formed the mens rea identified by Ind. Code §35-41-2-2 as "intentional", i.e., that he had had a conscious objective to strangle and kill. I can find no direct statement in the judge's records and statement of reasons quoted above for imposing the death penalty that he personally reached this level of certainty upon each of these elements comprising the aggravating circumstance. Quite obviously, until the point in time is reached that the judge conducts his own sentencing hearing to finally determine the sentence, he has not been called upon to make a factual determination beyond a reasonable doubt of the existence of the aggravating circumstance. The fact that the jury may have done so on some of the same elements in arriving at its verdict of guilty and in rejecting the plea of insanity as noted by the judge, cannot supplant the judge's obligation to do so. This finding of an aggravating circumstance by the sentencing judge is at the very core and heart of the final determination that death is to be imposed. The sentencing judge has not communicated to this Supreme Court Justice that he arrived at that finding at the required level of certainty. For this reason also, I cannot vote to permit his final determination to stand.

Prentice, J., concurs in part with concurring and dissenting opinion."

APPENDIX B

INDIANA CODE 35-50-2-9

"Death sentences.--(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one [1] of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one [1] of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law-enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that a least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review."

APPENDIX C

FINDING AND SENTENCE OF THE TRIAL COURT OF OCTOBER 2, 1982

Pronouncement of Sentence

"The Defendant, having been found guilty by a jury on the 12th day of September, 1981, and the Court having entered judgment of conviction of the crime Murder/Rape, and on September 15, 1981, the Court having heard arguments by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written presentence report, gives the following reasons for the imposition of the sentence: The jury in its verdict of guilty of Murder/Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the rules of the defense attorney, the prosecuting atttorney, the jury and the Judge. Theri prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The

The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial conslutant (sic), in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyerism, exhibitionism, sexual sadism, necrophelia, sexual telephone harassment and other disorders, all of which are aggravating circumstances, which far outweigh the mitigating circumstances.

Among other things, the Defendant's Psychologist, Dr. Frank Osanka, indicated that the Defendant is 'overpowered by the need for erotic release'. Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggravating circumstances.

The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and ttansported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance.

The Defendant had been previously convicted of robbery, a

Class C Felony, in Vanderburgh County and was on work release when arrested for this crime. This is an aggravating circumstance.

This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced in its recommendation.

The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance.

For all of the above reasons, the Court now sentences the Defendant to death.

The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances. The Court has no choice but to follow the law.

The Defendant is to be executed as by law provided on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff."

APPENDIX D

NUNC PRO TUNC ENTRY OF THE TRIAL COURT OF FEBRUARY 22, 1983

"STATE OF INDIANA)
) SS:
COUNTY OF BROWN)

IN THE BROWN CIRCUIT COURT

STATE OF INDIANA, Plaintiff
v.
THOMAS N. SCHIRO, Defendant

CAUSE NO. 81 CR 243

NUNC PRO TUNC ENTRY
PRONOUNCEMENT OF SENTENCING

The Defendant, Thomas N. Schiro, having been found guilty of Murder while committing and attempting to commit rape, by a jury on the 12th day of September, 1981, which verdict was: "We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information." William J. Yeager, Foreperson; dated September 12, 1981. The Court entered judgment of conviction of the said crime of Murder/Rape.

On September 15, 1981, the jury having been instructed to return, appeared. Present were Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana; the Defendant, Thomas N. Schiro, with his counsel, Michael Keating; and the members of the jury.

A hearing pursuant to Indiana Code 35-50-2-9 was held concerning the recommendation of sentencing. Both the attorney for the State and the attorney for the Defendant moved to incorporate the entire evidence of the trial. Said motion was granted by the Court. Arguments were made by the attorneys, instructions were read to the jury.

The jury, after due deliberation, returned unanimously with the recommendation that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. The matter was set for sentencing on October 2, 1981.

On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, subsection [1] The Aggravating circumstances alleged.

> (b) The aggravating circumstances are as follows:
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code §35-50-2-9, subsection (c) The mitigating circumstances that may be considered under this section are as follows:

> (1) The defendant has no significant history of prior criminal conduct.
> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
> (3) The victim was a participant in, orconsented to the defendant's conduct.
> (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
> (5) The defendant acted under the substantial domination of another person.
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
> (7) Any other circumstances appropriate for consideration.

The statute provides, as a mitigating circumstance, whether (1) the Defendant has no significant history or prior criminal conduct. The record in this case shows numerous instances of prior criminal conduct by this Defendant.

(a) David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court-appointed psychiatrists, found the Defendant to be sane at the time of the offense.

(b) The Defendant's witness, Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist.

(c) Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony.

(d) The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County, Indiana, and was on work release when arrested for this crime.

(e) The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harrassment and other disorders.

Indiana Code §35-50-2-9 provides two mitigating circumstances relating to Defendant's mental health:

> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder
>
> and
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(a) The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community.

(b) The record indicated that the Defendant has no remorse and is violent and sadistic. The Defendant's Psychologist and own witness, Dr. Frank Osanka, indicates that the Defendant is "overpowered by the need for erotic release".

(c) The fact that the Defendant committed these crimes, as the record shows, with gruesome, sadistic acts, including necrophelia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught, and malice in the crime for which he has been convicted. This shows that he planned the crime and planned how to avoid its consequences, showing Defendant's appreciation for the wrongfulness of his conduct and the consequences of his actions.

This shows that Defendant had unimpaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

(d) This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

The Statute also provides as a mitigating circumstance,

> (3) The victim was a participant in, or consented to, the defendant's conduct.

The victim obviously did not consent to being murdered. Defendant was also found guilty beyond a reasonable doubt, of raping the victim, therefore the victim could not have consented to being raped.

The Statute also provides,

> (4) the Defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence of an accomplice in this record.

The Statute provides,

> (5) The defendant acted under the substantial domination of another person.

There is no evidence on this record that shows that any other person substantially dominated Defendant.

The Statute also requires the consideration of,

> (7) Any other circumstances appropriate for consideration.

The age of the Defendant is twenty years. The Court does not find this to be a mitigating circumstance.

Since the State proved "beyond a reasonable doubt the existence of at least (1) of the aggravating circumstances alleged",

(Indiana Code §35-50-2-9, Section 9(9)) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

/s/ Samuel R. Rosen
SAMUEL R. ROSEN, JUDGE
BROWN CIRCUIT COURT

Dated: October 2, 1981"

NO. 83-5530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

THOMAS N. SCHIRO,
Petitioner

VS.

STATE OF INDIANA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Thomas N. Schiro, pursuant to Rule 46, moves the Court for leave to file his Petition for Writ of Certiorari to the Supreme Court of Indiana without prepayment of costs and to proceed in forma pauperis.

In support of his motion, the petitioner would show to the Court that he has heretofore been determined to be indigent and pauper counsel appointed to represent him at trial by the Circuit Court of Vanderburgh County, Indiana. Further, that he has heretofore petitioned the Circuit Court of Brown County Indiana for leave to appeal in forma pauperis, which request was granted, that pauper counsel was appointed to represent him on appeal to the Indiana Supreme Court, and that he was permitted to appeal to that Court without prepayment of costs.

In further support of his motion, petitioner would attach his affidavit of indigency.

JOHN D. CLOUSE
MICHAEL C. KEATING

By _____
1010 Hulman Bldg.
Evansville, IN 47708
Telephone: (812) 424-6871

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

THOMAS N. SCHIRO,
Petitioner

VS.

STATE OF INDIANA,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, THOMAS N. SCHIRO, being first duly sworn, depose and say that I am the petitioner inthe above-entitled case: that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this action are true.

1. Are you presently employed? No.

2. Have you received within the past twelve months any income from a business, profession or other form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? Yes; account at Indiana State Prison with a balance of $ 50.50 .

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Thomas N. Schiro
THOMAS N. SCHIRO

STATE OF INDIANA)
) SS:
COUNTY OF)

SUBSCRIBED AND SWORN to, before me, a Notary Public, in and for said County and State this 6th day of September, 1983.

My Commission Expires:
[redacted]

John Leonard Barnes
Notary Public
Residence Porter

NO. 83-5530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THOMAS N. SCHIRO,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by the Court in Cause No. 1181 S 329 on.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 451 N.E.2d 1047, and may be found in Petitioner's Appendix A.

STATEMENT OF THE CASE

On February 10, 1981, Petitioner was indicted in three counts for Knowing and Intentional Murder, Murder while committing and attempting to commit Rape, and Murder while committing and attempting to commit Criminal Deviate Conduct. On April 9, 1981, the State filed indictments claiming as aggravating circumstance justifying the death penalty that the Murder was committed knowingly and intentionally, and asking for the death penalty. The indictments charged that Schiro gained access to the home of an Evansville, Indiana woman and forcefully raped and sodomized her, beat and mutilated her, strangled her to death, and continued to mutilate and have sexual relations with the corpse. Schiro was tried and convicted of the murder.

Pursuant to Indiana procedure the jury then heard the issue of capital punishment, and ultimately issued its advisory

recommendation that the judge sentence defendant to a term of years, rather than death. Following consideration of a pre-sentence investigation report, the trial court, following an Indiana procedure upheld by the Indiana Supreme Court in appeal of this case, declined to follow the advisory recommendation of the jury, and sentenced Petitioner to death.

Following the denial of his Motion to Correct Errors in the trial court, Petitioner initiated an appeal, contending among other things that the trial court's written findings in support of its judgment were inadequate as a matter of State and Federal law. Before deciding any other issues, the Indiana Supreme Court remanded the matter to the trial court with orders to issue a nunc pro tunc entry restating its judgment in reviewable form, especially to specify the aggravating circumstance and mitigating circumstances concerning the offense and the offender upon which it relied in making its judgment.

The trial court complied with the said order, and following supplemental briefings on the new version of the trial court's judgments, the Indiana Supreme Court issued its opinion in this case upholding the conviction and the imposition of the death penalty. Following denial of the petition for rehearing in this case, Petitioner by counsel filed his petition for writ of certiorari in this Court on September 30, 1983, a copy of which petition was received by this office on October 3, 1983. Petitioner has moved for and received permission by this Court to proceed in forma pauperis.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The petitioenr contends that in three respects the opinion of the Supreme Court of Indiana was contrary to the applicable decision of this court. In order discussed herin, (which conforms to their chronological order as set forth above) these issues are:

I. Whether Indiana's procedure permitting a trial court to issue a judgment of death despite a jury recommendation to the contrary is impermissible as Double Jeopardy.

II. Whether the issuance and order directing a nunc pro tunc entry of findings supporting the imposition of the death penalty was improper as Double Jeopardy.

III. Whether the Indiana Supreme Court's procedures and standards for reviewing the judgment of death in this case conform to requiements of this Court.

SUMMARY OF THE ARGUMENT

I. This Court has explicitly approved the State of Florida's practically identical procedure permitting the court to issue a verdict of death despite an advisory jury verdict to the contrary. Indiana's procedure differs only in the higher degree of proof it requires for finding of an aggravating circumstance, but carefully avoids making the jury recommendation necessarily a "beyond a reasonable doubt" determination of any factual issue, and clearly provides that in its sentencing procedure the only final determination is that issued by the trial court judge. Since there is only one such determination, a defendant is not exposed to double jeopardy.

II. The Indiana Supreme Court remanded to the trial court for issuance of a nunc pro tunc restatement of its judgment to comply with the requirement that aggravating and mitigating circumstances related to the facts of the crime and the character of the offender be stated therein. This procedure was not a Double Jeopardy violation because it did not ask for a redetermination or retrial of any issues. It merely followed the same procedure which this Court has used in remanding to a State court for reconsideration of circumstances relating to its decision on the death penalty.

III. The Indiana Supreme Court has announced its standards for review of death sentences. It has interpreted a

rule concerning appellate review of sentences to require, in capital cases, a standard of review which conforms to the standards developed by this court. Specifically, the Indiana Supreme Court has announced that its purpose and standard of review is to ensure against the influence of improper or prejudicial factors at trial level, to determine that elements of arbitrariness and capriciousness are not present in a death sentence, to make an informed and guided inquiry into the appropriateness of the capital punishment in a given case, and to consider from the point of view of its statewide jurisdiction over all murder appeals, to ensure consistent, fair, and even-handed operation of the statute. These standards, as announced and as applied in this case, do not contradict the opinions of this court.

REASONS FOR DENIAL OF THE WRIT

I.

IT IS NOT DOUBLE JEOPARDY FOR A TRIAL TO OVERRULE A JURY'S ADVISORY RECOMMENDATION OF MERCY

Petitioner's grounds for issuance of a writ include the premise that is is impermissible for Indiana to institute a capital punishment procedure wherein a jury's sentencing recommendation is advisory only and the trial court may sentence a defendant to death despite a jury recommendation for mercy.

Petitioner asserts that the Indiana Supreme Court's decision in this case allowing such a procedure decided a Federal question in a manner contrary to this court's decision in Bullington v. State, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270. In Bullington the jury, under Missouri law the final sentencing authority, had issued a final determination of mercy, which automatically became the judgment of the court. After the judgment was set aside on other grounds, the State of Missouri again sought the death penalty. This Court held that Missouri was foreclosed from doing so as a limited exception to the rule that double jeopardy does not prohibit a harsher sentence at

retrial, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In Missouri, all issues involved in a death penalty determination were subject to the standard of proof beyond a reasonable doubt, and any decision had to be reduced to a written finding. Thus, it was impossible for the sentencing issue to be decided one way or another without a finding of proof, or failure of proof, beyond a reasonable doubt, that an aggravating circumstance existed and that there was sufficient beyond a reasonable doubt, in light of mitigating circumstances, to justify execution.

Petitioner attempts to liken the jury part of Indiana's procedure to such a "full-blown trial" on the punishment issue and a jury recommendation of mercy to a "verdict of acquittal." In Indiana's procedure the jury's deliberation is just the first stage in a single fact-finding process whose ultimate determinations are made only by the judge. This Court said, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) that death sentence determinations can more rationally and consistently be made by a judge who has sentencing and criminal law experience than by a jury which does not, and a jury may be properly used to provide community opinion to assist the judge in his final determination. Proffitt, 428 U.S. at 259, 96 S.Ct. at 2966.

This Court's goal of rational and consistent application of the death penalty is served by court sentencing with advice from a jury. The crucial distinction from Missouri's scheme is that in Indiana the judge's and the jury's deliberation are part of the same fact-finding and sentencing determination, while in Missouri the jury has sole discretion in such matters.

Where the jury's role is advisory, as in Florida, this court has affirmed death sentences pronounced despite jury recommendations of mercy. E.g., Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, ___ L.Ed.2d ___ (1983).

The only substantial distinction between the Indiana and Florida procedures is that Indiana requires any jury recommendation to be unanimous, whereas Florida permits a majority verdict and does not require any proof beyond a reasonable doubt. As a matter of State law, Indiana has, thus, provided a degree of protection for the defendant not required by this Court in Proffitt or Barclay by providing an initial "reasonable doubt" hurdle on the existence of an aggravating circumstance. But Indiana did not impose such a burden of proof on the issue of mitigating circumstances. It carefully refrained from establishing a system whereby a jury's recommendation of mercy is necessarily a finding of failure to prove beyond a reasonable doubt.

Thus it is clear that Indiana's system under which jury advisories of mercy might be contradicted by the trial court can be constitutionally operated. Our Court did not contradict Federal law in ruling that Indiana's establishment of such a system is not unconstitutional per se.

II.

PETITIONER WAS NOT PLACED IN DOUBLE JEOPARDY BY THE REMAND FOR FINDINGS

Petitioner claims a due process violation in the remanding of this case by the Indiana Supreme Court to the trial court judge for a nunc pro tunc re-entry of its findings. He characterizes this as a remand for "additional findings" (brief, p. 13), "complete re-evaluation" or a "redetermination of the evidence" (brief, p. 15).

Petitioner complains of double jeopardy and that the so called "redetermination" occurred without hearing or other opportunity of the Petitioner to be heard. Petitioner's position is based on a misconstruction of the nature and purpose of the Indiana Supreme Court's remand order.

Indiana in 1976 and 1977 eliminated all jury determination of sentencing (except for its advisory role in death penalty cases) and established a system of "presumptive" sentences for

each class of felony, to which a limited number of years could be added or subtracted by the judge for aggravating or mitigating circumstances.

The Indiana Supreme Court has adopted a requirement that the court must provide articulated reasons for any "nonpresumptive" sentencing, specifically citing a factual basis for the lengthened or shortened sentence based on the character of the offense and the offender. When trial courts fail to meet this requirement, the Indiana Supreme Court consistently applies the same remedy: The case is remanded with an order for the trial judge to reduce his findings to writing such as to allow review of the actual considerations for or against the sentence. Page v. State, (1981) ___ Ind. ___, 424 N.E.2d 1021; Green v. State, (1981) ___ Ind. ___, 429 N.E.2d 635. In such a case the Indiana Supreme Court demands no new decision of the trial court or any reweighing or reassessment by the trial court of the evidence. Such an order requires only that an entry state the reasons the court considered when the aggravated sentence was imposed. See Farina v. State, (1982) ___ Ind. ___, 442 N.,E.2d 1104. The Court often issues its order before continuing its consideration of any issues on appeal. E.g., Wilburn v. State, (1982) ___ Ind. ___, 442 N.E.2d 1098 rev'd on other grounds. In Wilburn, the trial court complied with such an order by filing a nunc pro tunc entry as to those reasons. The Indiana Supreme Court accepted the nunc pro tunc entry as a satisfactory means to comply.

States must insure that the "process for imposing a sentence of death" be made "rationally reviewable". Godfrey v. State, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398. This Court requires States to establish a procedure by which "meaningful appellate review" of the death sentence can be undertaken. Gregg, Proffitt, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). State appellate courts thus have a high duty to ensure that judgments of death explain all the trial court's

considerations in a manner which is rationally reviewable in light of the state's statutes and national and state case law. It follows that the reviewing court may (indeed, must) ensure such reviewability, by remanding when necessary to the trial court with orders to provide reviewable findings. The Indiana Supreme Court did so inthe first capital case to arise under our post - Gregg statute. Judy v. State, (1981) ___ Ind. ___, 416 N.E.2d 95, as well as in the instant case.

Subsequently to the complained-of remand order by the Indiana Supreme Court in this case, in Eddings v. Oklahoma, (1982) ___ U.S. 102 S.Ct. 869, ___ L.Ed.2d ___, this Court remanded a sentence to Oklahoma's state courts with instructions that they, "[o]n remand must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances." 102 S.Ct. at 887. This Court surely did not consider its instructions to reweigh the mitigating circumstances and create a reviewable record to violate of the prohibition against double jeopardy. It is an inescapable conclusion, then, that where a state Supreme Court likewise remands a capital case for a nunc pro tunc restatement of sentencing criteria, said remand is not improper.

All the cases cited by Petitioner to support his claims are distinguishable in crucial respects from this case. We have already mentioned the facts of Bullington v. Missouri, supra. In our case, by contrast, there was no issue of retrial or redetermination because the trial judge, not the jury, was the final sentencing authority, and he was not required to retry or redetermine the case, but only to provide a more complete statement of the reasoning he already had employed. Initially, he had found the existence of aggravating circumstances to "far outweigh" any mitigating circumstances. The Indiana Supreme Court only required the judge to explain by nunc pro tunc entry just what these aggravating and mitigating circumstances were.

In Eddings this Court actually called for a more sweeping redetermination than the Indian Supreme Court did in this case. The Indiana Supreme Court's more limited action to acquire a reviewable record (with no reweighing and no redetermination) must likewise constitute no double jeopardy.

Two other cases cited by Petitioner, Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 are inapplicable. They involve cases where convictions were reversed for insufficiency of the evidence. The judgment initially issued herein was incomplete due to inadequate stating of the factual considerations involved, not due to insufficiency of the evidence. The Indiana Supreme Court's remanding order was not a finding of insufficient evidence to support the judgment.

Finally, Petitioner cites Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1198, 541 L.Ed.2d 393 (1977) which holds that Due Process requirements must be satisfied in the sentencing process. He does not dispute that he was sentenced following a hearing at which it had to be proved to the fact-finder beyond a reasonable doubt that an aggravating circumstance existed and in which he was allowed to produce any evidence in mitigation he might have. He does not dispute that there was proper consideration of his pre-sentence investigation report. There is no allegation that the trial court relied upon any confidential information unknown to defendant, which was the fault in Gardner. Since the trial court here did not engage in any sort of redetermination or reweighing, but instead simply reported facts which it had not fully reported earlier, due process requirements were not violated.

Therefore, the Indiana Supreme Court's order of remand for a nunc pro tunc entry of reviewable factual findings is not in conflict with applicable decisions of this Court.

III.

INDIANA'S PROCEDURE FOR REVIEW OF SENTENCE IS NOT IMPROPER

Petitioner maintains that the Indiana Supreme Court's holding that its procedure to review death sentences is adequate and insures that the death penalty will not be inflicted in an arbitrary and capricious manner conflicts with this Court's holdings.

Under the applicable Indiana statutes and case law a trial court which issues a judgment of death must also make findings of fact that demonstrate the existence of the statutory aggravating factor beyond a reasonable doubt, and the factual basis supporting the trial court's determination. Indiana Code 35-4.1-4.3; Spinks v. State, (1982) ___ Ind. ___, 437 N.E.2d 963.

Any death penalty must be reviewed. Such review includes consideration of the entire record, including the trial transcript, pre-sentence report, and transcript of the sentencing hearing. Judy v. State, (1981) ___ Ind. ___, 416 N.E.2d 95 Petitioner asserts that the Indiana Supreme Court narrowly applies the standards listed in the Indiana Rules for the Appellate Review of Sentences, Rule 2, and so will not interfere with a sentence unless it is so "manifestly unreasonable in light of the nature of the offense and the character of the offender" that no reasonable man could agree with it. Recourse to the Indiana Supreme Court's holdings in cases where it has discussed the Rules or reviewed death penalties shows that in capital cases it has not interpreted its Sentence Review Rules so narrowly.

In 1976, this Court decided the cases of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d

913 (1976) and their companion cases. Indiana's capital punishment statute, Indiana Code 35-50-2-9, follows the Florida procedure accepted by this Court in Proffitt, supra. Indiana's scheme kept all the important procedural characteristics of the Florida statute: The trial is bifurcated into guilt and penalty phases; the jury's recommendation regarding sentencing is advisory to the judge, not final or binding; the trial judge is the final sentencing authority; and there is a mandatory review of the sentence by the state supreme court. In addition, the Indiana statute sets a higher standard by requiring the jury, in order to recommend, and the judge, in order to sentence to death, to find the existence of at least one of the specified statutory aggravating circumstances beyond a reasonable doubt. Ind. Code 35-50-2-9. The statute requires the jury and the judge to consider any circumstances in mitigation of the sentence.

In the first case to arise under the new statute, Judy v. State, (1981) ___ Ind. ___, 416 N.E.2d 95, the Indiana Supreme Court cited Indiana Rules for the Appellate Review of Sentences, but then went on to state its particular aims in reviewing death penalties (Id., at 108): "... to safeguard against the influence of improper or prejudicial factors at the trial level, and to ...determine that the elements of arbitrariness and capriciousness ... were not present in the sentencing decision." With those considerations in mind, the Judy court said it would "meaningfully and systematically review" each capital punishment case "in light of other death penalty cases." Such a mandatory review of a trial court's articulated reasons for imposing the death penalty assures "consistency, fairness and rationality in the evenhanded operation" of the death penalty statute, the Court said. The issue, said the Court, is "the appropriateness of capital punishment in a given case." The court did not state that the issue was whether or not the

punishment was "manifestly unreasonable" or whether the test of that unreasonableness was whether "any reasonable man" would disagree with it. In application the Supreme Court determined in Judy "that the sentence of death ... was not arbitrarily or capriciously arrived at, and, without any doubt, [was] reasonable and appropriate." Judy, supra, 416 N.E.2d at 111.

In Brewer v. State, (1981) ___ Ind. ___, 417 N.E.2d 889, cert. denied ___ U.S. ___, 102 S.Ct. 3510, 73 L.Ed.2d 1384, the Indiana Supreme Court noted that even though the death penalty statute does not specifically require it, the court would require that the trial judge specifically state the factors relied upon in reaching his decision. The Indiana Court went on to note that its review would heed the guidelines established by this Court in Gregg, Proffitt, and Woodson, supra. It said that "the function of appellate review in the overall consideration of constitutionality [of a death sentence] is to assure that the system, as applied in a particular case, precludes the capricious and arbitrary infliction of the penalty." 417 N.E.2d at 900.

The Indiana Supreme Court then went on to discuss the meaning of the sentence review rule's standard of "manifest unreasonableness of sentence" as applied in capital cases. It said that since "capricousness or arbitrariness in the infliction of the death penalty cannot be other than cruel and unusual", Indiana's formulation of "manifest unreasonableness" of sentences required, in death cases, a review on the same standards announced by the Supreme Court of the United States. 417 N.E.2d at 900. In the Brewer case the Indiana court went on to state, again, that the court's concern on review is the "appropriateness, under the statute, of capital punishment in a given case" and the assurance of "consistency, fairness and rationality in the operation of the death penalty statute." 417 N.E.2d at 901.

In Williams v. State, (1982) ___ Ind. ___, 430 N.E.2d 759, cert. denied ___ U.S. ___, 103 S.Ct. 479, ___ L.Ed.2d ___, the Court, after citing the Sentence Review Rules, again said that at least as applied in capital cases, the rules placed emphasis on each individual defendant and required "thorough consideration of facts presented by the entire record." 430 N.E.2d 765.

In the instant case, Schiro v. State, (1983) ___ Ind. ___, 451 N.E.2d 1047, the Indiana Supreme Court repeated the applicability of its standards for review stated in Judy, supra: That such cases are reviewed "in light of other death penalty cases"; and that the Court would make an "informed, focused, guided, and objective inquiry" into "the appropriateness of the capital punishment in a given case." Schiro, 451 N.E.2d at 1052-1053. Thus, it is clear that in practice the Indiana Supreme Court will review capital cases in conformity to the standards announced by this Court.

In this case, the Indiana Supreme Court, after discussing its standard of review, explicitly stated that it would "examine whether the sentence of death is appropriate." 451 N.E.2d 1058.

Its consideration of the facts included Petitioner's conscious and pre-planned decision to gain admittance to the victim's house with the purpose of raping her and then murdering her so that he could perform his necrophiliac "ritual". The Indiana Court considered the multiple rapes and vicious assaults which preceded the death by strangulation, and the sadistic and sexual assaults of the corpse. The facts in the case also included the lack of mitigating circumstances: Petitioner's numerous prior criminal acts including rapes and criminal deviate conduct ("criminal deviate conduct" is the term used in Indiana law for non-consensual sexual contact other than penile-vaginal intercourse Ind. Code 35-4-4-2), sadistic assaults on a two

year-old child and rape of a mother in the presence of her child; lack of remorse, and an absence of any impairment of his ability to appreciate the wrongfulness of his conduct or conform his conduct to the law. The Indiana Supreme Court thus in practice reviewed this case in such a manner as to given individualized attention to the facts and circumstances of the case and the character of the accused. The Court's ultimate decision was "that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate." 451 N.E.2d 1058-1059.

Therefore, the State of Indiana would submit that its supreme court in applying the applicable statutes, rules, and case law does, as it says it does, affirm death penalties only when appropriate in light of the nature of the offender and the offense.

The other aspect of Indiana's procedure to be discussed is whether it assures that the death penalty will not be imposed when disproportionate in light of the facts in other capital and non-capital murder cases. Petitioner maintains that our procedure is marked by a "total absence of any type of proportionality review."

Pursuant to Gregg, supra; Proffitt, supra; Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2633, ___ L.Ed.2d ___ (1983) and Barclay v. Florida, ___ U.S. ___, 10 S.Ct. 3418, ___ L.Ed.2d ___ (1983) our court is required to establish a review procedure which assures that the application of the death penalty is consistent in similar cases.

Proffitt v. Florida, supra upheld Florida's procedure because its Supreme Court had indicated judicially that it considered its function to be to see that reasons present in one case will reach a result similar to that reached in another case under similar circumstances, State v. Dixon, 283 So.2d 1 (Fla., 1973), and found that the death cases were "consistently

reviewed by a court which because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the even-handed operation of the state law", thus assuring that death will not be "wantonly" or "freakishly" imposed. Proffitt, 96 S.Ct. at 2966, 2970. Zant v. Stephens, supra, does not alter the standards announced in Gregg and Proffitt, but simply notes again with approval Georgia's procedure.

In the Stephens, case, supra, this Court used for discussion the Georgia Supreme Court's analogy of a procedural "pyramid" in homicides. Indiana's "pyramid" would "filter out" cases as they flow from the base to the apex: First, homicides that are lesser than murder. Second, murder cases where no statutorily defined aggravating circumstance is found to exist. Third, murder cases with aggravating circumstances which are sufficiently offset by mitigating circumstances to outweigh the aggravation. Finally, in all cases reaching the fourth plane in the "pyramid", the State's highest court reviews the sentence again in light not only of individual facts of the offense and the offender, but, as a state high court is uniquely situated to do, in proportion to others in similar cases. Indiana's "pyramid" is much narrower at the lower levels than either Florida's or Georgia's. Whereas our two sister states include subjective aggravating circumstances such as the outrageousness or depravity of the offense (Sec. 272534,1(b) of the Georgia Code); our statute's aggravating circumstances are limited to narrowly drawn, objective factual elements. Indiana Code 35-50-2-9. The objectivity of Indiana's permissible list of aggravating circumstances limits possibility of capricious or disproportionate punishment at an earlier level than Florida or Georgia.

The Indiana Supreme Court has, in this case and others, explicitly held that it can and will "meaningfully and systematically review each case in which capital punishment has been

chosen, in light of other death penalty cases, and so ensure consistent, fair, and evenhanded operation of the statute." Judy, supra, 416 N.E.2d 95 at 108 (emphasis added). In this case the Indiana Supreme Court stated that "because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana." Id. at 1052.

In Barclay v. State, (1983) ___ U.S. ___, 103 S.Ct. 3418, ___ L.Ed.2d ___, this Court did not enlarge the requirements it previously stated as regards review for disproportionality of punishment, but simply observed that its decision was buttressed by Florida's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great." 103 S.Ct. at 3428.

In Barclay, this Court stated that:

> It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffitt v. Florida [full citation omitted] and as long as the decision is not so wholly arbitrary as to offend the constitution the Eighth Amendment cannot and should not do more.

103 S.Ct. at 3424.

Petitioner contends that of 18 reasonable persons who have considered the issue of his punishment (the jury, the judge, and the Indiana Supreme Court), fourteen (i.e., the jury and two state Supreme Court justices) have concluded that the petitioner should not have received the death penalty.

This argument (besides ignoring the actual roles played by each of these bodies) overlooks the fact that Petitioner appeared to have deliberately set out to feign bizarre behavior

on his part whenever the jury was present. Psychiatric evidence indicated that his behavior in the past had been to evade responsibility for his actions by acting mentally ill. The trial court noted in its finding that this behavior occurred only when the jury was present and concluded that this ploy for sympathy had unduly influenced the jury. Thus, 12 members of Petitioner's "majority" were considered by the trial judge's findings to have been prejudiced, a fact which justified the trial court in reaching a different conclusion from the jury.

Neither of the other two members of the"majority", i.e., the dissenting Indiana Supreme Court Justices, dissented on the basis that the sentence was freakishly applied, arbitrary or capricious, or disproportionate. (Justice Prentice, in fact, in his dissent characterized Petitioner as "a paragon of revulsion." 451 N.E.2d at 1070) Thus, we do not believe that any of the Petitioner's "fourteen people" can be said to have reasonably concluded, based on the facts and circumstances, that the Petitioner's crime and character did not justify the death penalty.

In placing proportionality in issue, Petitioner lists all reported Indiana capital cases in which juries have rejected death requests by the State. The trial court judges in those cases did not differ from that recommendation. In fact, the instant case in the only time a judge has differed with a jury recommendation for mercy. He asks rhetorically what distinguished his case from two of these.

In the first case, Miller v. State, (1983) ___ Ind. ___, 448 N.E.2d 293 defendant was convicted of felony/murder in a case where a two-year old child died of blows to the abdomen and head, The underlying criminal deviate conduct conviction was based on bruises resulting from biting on the child's buttocks, which constituted evidence to support "touching . . . with intent to gratify sexual desires", an element of the underlying felony. To aggravate this offense to capital status, the

State would have had to prove that the felony/murder was a "knowing and intentional" felony/murder. Ind. Code 35-50-2-9. Repellant as the Miller case was, there was no direct evidence of actual intent to kill. Here of course, Schiro admitted his forming a plan to "destroy" his victim when she once attempted to leave.

In the other case, Dunaway v. State, (1982) ___ Ind. ___, 440 N.E.2d 682 defendant, during an argument with a woman with whom he had just had sex, killed her with a knife. The State alleged as an aggravating circumstance knowing and intentional murder in the commission of criminal deviate conduct. But there was no evidence that the sexual acts which preceded were non-consensual. The killing, although premeditated, occurred in hot blood. The Indiana Court decision in Dunaway strongly suggests that if a death sentence had been imposed, the Court might have set it aside due to lack of evidence of criminal (i.e., non-consensual) deviate conduct.

In contrast, the killing in this case was admittedly coldly premediated. There is ample evidence that the sexual acts were forceful rapes. Thus, in comparison with Miller and Dunaway, the instant case appears much more brutal, callous, premediated, and depraved. The Petitioner here is entirely without remorse, whereas in Miller the defendant himself called for physicians to try to save the little girl, and Dunaway appears to have expressed remorse. Our procedure in practice made a rational distinction between the defendant in the instant case and those in the cited cases.

Petitioner's final point on this issue is whether the Indiana Supreme Court applied an incorrect standard of review in considering a judge's disagreement with a jury's recommendation of mercy.

In 1976 this court in Proffitt cited as a safeguard in Florida's procedure that the Florida Supreme Court used a standard that a sentence of death following a jury recommendation of life with be upheld only on facts so "clear and convincing that no reasonable person could differ." supra, at 249, 96 S.Ct. at 2960, 59 L.Ed2d at 921. This standard was originally applied by the Florida Supreme Court in Tedder v. State, (Fla., 1975) 322 So.2d 908. In Tedder, Florida moved for the death penalty under the Statutory aggravating circumstance that the killing was especially "heinous, atrocious, or cruel" (a subjective standard which Indiana does not allow as an aggravating circumstances). The basis for the Florida Supreme Court's reversing the judge's overruling the jury's mercy decision was that the defendant's allowing one of his victims, after being shot, to languish without assistance, although cruel, was not what the legislature intended when it required that the killing be "especially" heinous.

This Court cited the Tedder standard more recently in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, L.Ed.2d ___. That was the killing of a man selected at random and torture/murdered with the objective of initiating a racial war. Since codefendant had been sentenced to death, the Florida Supreme Court held that the trial judge was correct in concluding that it was unreasonable for the jury to be lenient. Barclay v. State, (Fla. 1977), 343 S.2d 1266.

However, neither Proffitt nor Barclay held that the Tedder standard was required by this Court. In fact, in Proffitt this Court explicitly held that a judge's sentencing "should lead, if anything, to even greater consistency in the imposition at trial level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore, is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252, 96 S.Ct. at 2966. Proffitt

also notes, approvingly, that the judge may be in possession of more facts relevant to sentencing than the jury.

In the Indiana Supreme Court's consideration of Petitioner's invitation to apply the Tedder standard in such cases, the Court stated that:

> While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about he imposition of the death penalty. Trial courts are presumed to know and to understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. . . . [T]he trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater sentencing consistency.

Although this Court has held the Tedder standard is helpful in situations where a jury has reached its recommendation of mercy on weighing an allegation that the killing was "especially heinous, atrocious, or cruel", it has not held it to be necessary where the aggravating circumstance is on objective factual issues and there is sufficient other indication that the death sentence is not imposed capriciously, arbitrarily, or freakishly.

However, we believe that if Florida applied the Tedder standard to the facts in this case, it would conclude that jury leniency could not be agreed with by a reasonable man in possession of all the facts, including the sham "mental illness". Our basis for this conclusion is a review of about two dozen Florida cases, especially McRae v. State, (Fla. 1981) 395 So.2d 1145.

The facts in McRae are strikingly similar to the facts in this case. The jury recommended a life sentence. The Florida Supreme Court concluded that an attempt to convince the jury of the existence of the mitigating circumstance of "under the influence of extreme mental or emotional disturbance at the time the crimes were committed" must have been successful. "There is

no other explanation for their advisory verdict in view of the heinous nature of the killing," the Florida Court found. "We find their recommendation has no reasonable basis under the circumstances of this cause."

McRae suggests that even under Florida's Tedder standard it would unreasonable to hold that there was anything in Petitioner's character or the character of the offense to mitigate this offense. The State of Indiana disagrees that it is necessary that no reasonable person could agree with a jury recommendation before a judge may overrule it. We think that it is sufficient if the judge's determination can be held to be reasonable and not disproportionate. The trial court judge was aware of the Petition's bizarre behavior whenever the jury was present. He could properly conclude from this that the jury was tricked into its unreasonable recommendation. The trial judge also knew that Petitioner frequently feigned mental illness in the past. The judge explicitly cited this consideration in his sentencing findings.

The State of Indiana believes that in light of these facts our Supreme Court was not in conflict with applicable decision of this Court when it held that Petitioner's sentence was given the requsite review on proper standards.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformity with the opinions of this Court and that the Petitioner for a Writ of Certiorari should be denied.

Respectfully submitted,

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